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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 ADONNA FROMETA,

4  
5 Plaintiff,

6 v. 07 CV 6372 (HB)

7 MARIO E. DIAZ-DIAZ and  
8 ALL AMERICAN HAULERS RECYCLING,

9 Defendants.  
-----x

10 New York, N.Y.  
11 September 10, 2008  
12 9:45 a.m.

13 Before:

14 HON. HAROLD BAER

15 District Judge  
16 - and a jury -

17 APPEARANCES

18 SLAWEK W. PLATTA, PLLC  
19 Attorneys for Plaintiff  
20 BY. SLAWEK W. PLATTA

21 WILSON ELSEER MOSKOWITZ EDELMAN & DICKER LLP  
22 Attorneys for Defendants  
23 BY: STUART A. MILLER  
24 MICHAEL W. COFFEY  
25

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1 (Trial resumed; in the robing room)

2 THE COURT: Good morning, everybody. Did we pass out  
3 the copies?

4 THE LAW CLERK: Not yet. I was waiting for you.

5 THE COURT: We have both verdict sheets and our jury  
6 charge and the first 23 or 4 pages are all boilerplate. These  
7 are just copied from my previous moments of charging. I think  
8 probably you ought to look them over. There is no reason why  
9 we can't change them. I just don't think they are likely to be  
10 changeable. Did you find the previous requests?

11 THE LAW CLERK: Yes, we have them.

12 THE COURT: Just as a little additional information,  
13 if in fact we get to that juncture after the charge, I am going  
14 to mark all of your requests as court exhibits. So don't  
15 bother coming by and telling me how you have these 18, 20  
16 objections because, in fact, there will be objections that you,  
17 obviously didn't -- they are in your charges somewhere.

18 Go ahead, read these carefully. I am going to get  
19 some water which I only asked for ten minutes ago.

20 Where are you in terms of concerns?

21 MR. COFFEY: I think the verdict sheet is fine.

22 THE COURT: I didn't even know we gave that to you.  
23 Anna has more faith in terms of movement.

24 MR. COFFEY: As to the charges, we have no exceptions  
25 to the charges.

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1           MR. PLATTA: Your Honor, I have asked that the verdict  
2 sheet will actually be changed because my client has -- she has  
3 actually spent over 50,000 -- in the no-fault coverage in this  
4 case which is equivalent to basic economic loss. Therefore, it  
5 becomes a separate and distinct cause of action, not really  
6 connected with the threshold question and proximate cause of  
7 her injuries. It's a separate cause of action that just  
8 because of her passing the threshold of 50,000 bucks in the  
9 no-fault, she is entitled to economic loss, regardless of  
10 threshold.

11           THE COURT: That's a decision I make.

12           MR. PLATTA: Correct, Judge.

13           THE COURT: We don't have to put it in the jury  
14 charge.

15           MR. PLATTA: I would just request it be done in a way  
16 that the jury has the option to choose between the two causes  
17 of action instead of deciding economic loss only after deciding  
18 if this is a proximate cause of her injuries. But basic  
19 economic loss only goes to economic loss and it's a separate  
20 cause of action unrelated to any of the proximate cause of the  
21 injuries.

22           THE COURT: I understand you. I am not sure that  
23 that's anything that I shouldn't be able to make a decision  
24 about independently since we have -- it seems to me that's what  
25 the statute suggests, so if there is some language that you

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1 gave us that I can look and see that I should give that to the  
2 jury, I'll be glad to give it to the jury. At the moment all I  
3 know is that's something reserved for the Court.

4 MR. PLATTA: That's correct, your Honor. All I'm  
5 trying to say is that I would appreciate if the jury be given  
6 the option of choosing between the two because in this case --

7 THE COURT: The option between the two. Between the  
8 \$50,000 and whatever these -- whatever you've proven.

9 MR. PLATTA: Between whatever I've proven because of  
10 the 50,000.

11 THE COURT: Over and above the 50,000, correct, if  
12 that's how I come out?

13 MR. PLATTA: Correct. And then deciding whether it  
14 was a threshold case or not because it's a separate and  
15 distinct cause of action --

16 THE COURT: Doesn't the threshold have to do with what  
17 we have put down here in terms of what it is --

18 MR. COFFEY: Yes.

19 MR. PLATTA: No, your Honor. It's a separate and  
20 distinct cause of action for economic loss in this case. And  
21 because of my client spending over 50,000, she has met basic  
22 economic loss pursuant to 5104 insurance statute of New York.

23 THE COURT: I hope you have a charge like that. I'll  
24 be glad to look at it.

25 What do you have to say?

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1           MR. COFFEY: I believe your Honor has already said  
2     it's a judicial determination and I think the jury verdict  
3     sheet is appropriate, and I believe it goes to the central  
4     issue and it is an appropriate verdict sheet.

5           THE COURT: If you give me a charge, I'll be glad to  
6     look at it, but you have to do it in the next hour.

7           MR. PLATTA: Your Honor, there is no charge for that.  
8     I checked that. However --

9           THE COURT: You have the statute, right?

10          MR. PLATTA: The insurance statute states that once  
11     you have the 51 -- once you spend the 50,000, that means you  
12     met the basic economic loss. That statute I can definitely  
13     give you. But there is no PJI charge that would actually  
14     correlate that. It's an economic loss.

15          THE COURT: There is nothing you can give me, there is  
16     nothing that's going to change. That's what the lawyers are  
17     supposed to do, is to provide me with requests.

18          MR. PLATTA: Your Honor, at this point, what happens  
19     is, the jury will be deciding the case twice; on the  
20     threshold -- once for economic loss and second for the actual  
21     threshold. All I'm asking for is they will be deciding  
22     threshold as a separate issue and they will decide economic  
23     loss based on what was presented by the life care planner and  
24     basically economic loss that was met and whatever expenses  
25     Ms. Frometa incurred as a result of this accident. If they

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1 will have to decide threshold first and go into basic economic  
2 loss --

3 THE COURT: Did you have a verdict sheet that did  
4 that?

5 MR. PLATTA: My proposed verdict sheet was actually  
6 addressing that.

7 THE COURT: Let's see it. I'll read it so -- you must  
8 have a copy of it.

9 MR. MILLER: Is this the new one you sent to us  
10 yesterday?

11 MR. PLATTA: That's correct.

12 THE COURT: It's No. 2 or 1 and 2? 1 is as a result  
13 of the accident, has the plaintiff sustained a  
14 medically-determined injury or impairment of a nonpermanent  
15 nature?

16 MR. PLATTA: The first questions are threshold  
17 questions, but the difference between this jury verdict sheet  
18 and mine is that after responding no to the threshold question  
19 they still have to go to economic loss because it's a separate  
20 cause of action.

21 THE COURT: I understand you now. I thought that my  
22 decision was the threshold decision.

23 MR. PLATTA: I'm sorry, Judge. I don't understand.

24 THE COURT: With respect to the \$50,000, that's the  
25 threshold decision, right?

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1 MR. PLATTA: That's the basic economic loss.

2 THE COURT: So far as I understand it, if the  
3 threshold decision is my decision we don't have to give that to  
4 the jury?

5 MR. PLATTA: That's correct, your Honor. You can do  
6 whatever you wish.

7 THE COURT: I'm here to learn just like you.

8 MR. PLATTA: Absolutely. I'm learning all the time  
9 and from you the most of course.

10 THE COURT: I am going to look at the insurance code  
11 law, whatever they call it, and see if there is a distinction  
12 that I can make. I don't think there is a problem in terms of  
13 making it. I am not sure what you gain by it.

14 MR. PLATTA: That, basically, this case has to be  
15 decided on two grounds, on the threshold and on economic loss.

16 THE COURT: One of us is not listening to the other.  
17 I thought you agreed with me that with respect to the threshold  
18 issue that was an issue that I decide, that's left for the  
19 Court, not for the jury. So if I've made that decision in your  
20 favor, let us assume I made it in your favor, then that's not  
21 left for the jury to do a second time.

22 MR. PLATTA: That's correct. In this situation,  
23 you're absolutely right, your Honor.

24 THE COURT: That helps us all.

25 Anything else? There is a long decision here on pain

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1 and suffering. I trust you've read it carefully -- a long  
2 charge. There are numbers that you really have to fill in are  
3 from Dr. Kincaid's thought, so we really can't charge the jury  
4 like this because it does give -- 29 is where we are or where I  
5 am, you apparently not. At the very bottom where it says  
6 plaintiff should fill in.

7 THE LAW CLERK: This information is in the life care  
8 plan that in your proposed jury instructions, Mr. Platta, you  
9 left a blank here.

10 MR. PLATTA: Yes.

11 THE COURT: I asked him that question or you did, but  
12 I don't remember the answer. And I gather you're not buying  
13 daily, so I can't even look at the transcript. So it's all  
14 you. Think about it, but you better give it to me before we  
15 pack it in. Not here, but when we go outside to sum up.  
16 Hopefully, you will know it and you will have given it to Anna  
17 or to me to fill in the blanks.

18 MR. PLATTA: Sure.

19 THE COURT: On the summations standpoint, I guess the  
20 defendant sums up first. What is it that you believe you will  
21 take in the way of time?

22 MR. MILLER: I'll probably take half hour to 40  
23 minutes, your Honor.

24 THE COURT: What about the plaintiff?

25 MR. PLATTA: No more than that.



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1           THE COURT: We are talking about an hour because that  
2 will be just ducky if we can have them here for an hour, hour  
3 and 15 minutes. My 12:30 order to show cause will not be  
4 interfered with. That will be fine. You are just going to  
5 fill in the blanks, right?

6           MR. PLATTA: That's correct. Your Honor, I see that  
7 the PJI charge 2:301 damages itemized in the verdict would not  
8 be included.

9           THE COURT: I think there may have been another blank.

10          THE LAW CLERK: Page 30. It's essentially the same.  
11 It's the remaining number of years in her life.

12          THE COURT: You can stay here and figure it out, but I  
13 am going back to see what my desk -- if I can get behind my  
14 desk after two trials in two weeks it's unlikely, but we will  
15 make a stab at it.

16          We will see you at 11, gentlemen, in an hour.

17          I have something called the defendants' requests to  
18 charge which I'm marking as Court Exhibit A. What's the date?  
19 9/10. And the next one is defendants' proposed verdict form  
20 and I'll mark Exhibit B. And plaintiff's requested charge as  
21 Court Exhibit C. And proposed by plaintiff verdict sheet and  
22 that will be Court Exhibit D. I don't think we have anything  
23 else. If you've submitted anything else, I'll be glad to mark  
24 it so you know that anything in here, should you go to a higher  
25 authority, will be countenanced by that group of three.

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1           MR. PLATTA: Your Honor, I believe the only other  
2     thing that is left out are the letters that I put in the  
3     evidence regarding bad faith statement that I made yesterday,  
4     but they are in the courthouse and --

5           THE COURT: Do you have a copy of that?

6           MR. PLATTA: Yes. I can bring that in.

7           THE COURT: Give me it.

8           MR. MILLER: I'll explain --

9           THE COURT: We will mark it as Court Exhibit E.

10          MR. MILLER: Your Honor, one other issue that Mr.  
11     Platta and I discussed -- we resolved 99.9 percent of it -- is  
12     the employment records. On the airlines -- rather, on Rick's  
13     Cabaret, we have agreed not to give the jury the dancer  
14     guidelines but rather the only thing we are giving them is the  
15     entertainer charge summaries redacted, if we could just  
16     photocopy it and have the amount paid and running totals taken  
17     off since it's not in their sight because there is no lost  
18     earning claim.

19          And with that, as well, what I want to submit that  
20     Mr. Platta is objecting to -- and he can tell you his own  
21     objection -- is the general application information form. It  
22     just lists her name and her address and her pedigree. The  
23     reason, which I questioned her about, is her past work history  
24     and what she has done and it lists on it where she has worked,  
25     which was not the same as what she listed with her other

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1 employer, the airlines, and it goes directly to the credibility  
2 issues, which is an essential part of our case.

3 THE COURT: I think we talked about that and it was  
4 admitted over objection, at least the testimony was. I don't  
5 know if I ever saw any of your pieces of paper.

6 MR. MILLER: We took out everything to do --

7 THE COURT: You don't get on your knees.

8 MR. MILLER: All of that is gone. We were never  
9 planning to put it in. This is the only document, your Honor.

10 THE COURT: Do you have a concern with this?

11 MR. PLATTA: That's correct. The last three lines of  
12 the document, beside giving personal information to the jury,  
13 beside giving social security number, which is privileged,  
14 beside giving history, which is actually prejudicial and that's  
15 why defendants are looking for that, the history is only  
16 talking about her experience as a dancer. And that is in no  
17 way related to the case because it's in prior years, it has  
18 nothing to do, it could only be prejudicial and create a  
19 question to the jury as to kind the work my client is doing.

20 MR. MILLER: Your Honor, our position is it's  
21 extremely relevant, it's directly on point. In her application  
22 for the airlines she wrote down, Cohen's Optical, Economy Best,  
23 private airlines, MGM Mirage. She has testified that she had a  
24 history of dancing. We never made her dancing a central issue.  
25 What we have made an issue throughout the case is her

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1 credibility, and she made a misrepresentation on her employment  
2 form and that's why we are looking to submit it.

3 If Mr. Platta want to redact her social security  
4 number that's written throughout all the medical records, I'd  
5 be happy to do it. If he wants us to redact and put 1, 2, 3,  
6 Mary Jane Lane for the address, I'd be happy to that as well.

7 MR. PLATTA: Your Honor, the reason why I want this  
8 not to be presented to the jury is because this is an  
9 application for Rick's Cabaret, for the gentleman's club.

10 THE COURT: With Rick's New York City Entertainer name  
11 on it?

12 MR. PLATTA: Correct. That is an application for  
13 employment as a dancer. That's why she lists the history as a  
14 dancer. Putting in front of the jury these two documents and  
15 saying she's untruthful is not only unfair; it's prejudicial.

16 THE COURT: What is Scores?

17 MR. MILLER: I don't know, your Honor. I have never  
18 been there or heard about it. However, I have come to  
19 understand from the New York Post that there are a lot of tax  
20 issues in that facility and, as I have done some site  
21 inspections on a tax matter.

22 Your Honor, our position is, throughout the case, the  
23 jury knows she is an adult entertainer. Plaintiff's counsel  
24 has stated it in jury selection. We have never discussed it.  
25 We never made it a central theme in our case. In fact, we

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1 don't care that she is a dancer. What we care about is that  
2 that information is in direct contrast with the information  
3 that she provided in her application of her employment with  
4 Excel Aire.

5 THE COURT: Why can't we just say, stipulate to the  
6 fact, we agree that she had different employment than is on the  
7 employment application that's in evidence.

8 MR. MILLER: If your Honor would like to read that to  
9 the jury during the charge, I'm okay with that.

10 MR. PLATTA: Your Honor, the problem with that is  
11 this. This is an application for a dancer. This is an  
12 application for a flight attendant. If she would be putting  
13 her experience as a dancer into her application for flight  
14 attendant, she would never be hired. If she would be putting  
15 the experience of a flight attendant into the dancer  
16 application, she wouldn't be hired as well. These are two  
17 separate jobs, two separate positions.

18 THE COURT: All the defendant is trying to show is  
19 that in one place she applied saying her experience was X and  
20 in another place she applied and said her experience was Y.  
21 Now, whether or not you're supposed to mold your experience in  
22 the job you're looking for, or you're supposed to simply repeat  
23 what's honest as a question that they would like the jury to  
24 have in front of them.

25 MR. PLATTA: Your Honor, I don't think it's a question

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1 of honesty because you have three lines here and you have three  
2 lines here. You have to list the most relevant experience to  
3 the position that you're applying for and not every single --

4 THE COURT: I don't understand the most relevant. You  
5 don't think she could have fit American Airlines on these three  
6 lines?

7 MR. PLATTA: I don't think they would be even relevant  
8 to her work history for a club.

9 MR. MILLER: Your Honor, Mr. Platta just made a major  
10 misrepresentation. They don't list three or four lines just to  
11 pick and choose what you want. The employment application,  
12 which she filled out the day after the accident, where she  
13 certifies, I certify the facts contained in this application  
14 are true and it goes on, under former employers, it says: List  
15 below last four employers. Those are the last four employers  
16 on that application with Rick's. The employers that she lists  
17 on her airlines application go back to 1988.

18 MR. PLATTA: Airline, counselor, not clubs.

19 MR. MILLER: Employers. Doesn't say, only list the  
20 relevant employers that you think that we want to hear about  
21 and remember you're certifying that you're certifying this is  
22 true to the best of your knowledge.

23 MR. PLATTA: Counselor, it's actually an application  
24 for a flight attendant position.

25 MR. MILLER: Cohen's Optical is something --

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1           THE COURT: My concern really is whether or not these  
2 are the last -- they are only looking for the last employers,  
3 generally. Here, it just says dance experience. Maybe that  
4 saves you.

5           MR. MILLER: No. But, your Honor, the application  
6 with Excel Aire says the last four employers and that's a lie.  
7 The last four employers are not Cohen Optical. It's Rick's,  
8 which is not even mentioned on there. It's the other dance  
9 places where she was dancing.

10          MR. PLATTA: Your Honor, it's clear that the  
11 defendants want to pressure the jury just by showing them that  
12 the relevant experience to the position that she is applying  
13 for is something that is untruthful in accordance to what they  
14 say right now. It will only prejudice the jury, will not bring  
15 any probative value to the case.

16          THE COURT: As far as I'm concerned, where they ask  
17 for the last four employers, if, in fact, one of them was  
18 Rick's New York City Entertainer, whenever the last four from  
19 2/16/07, which is the date she filled this out, then why  
20 wouldn't it be fair to let the defendant show that she really  
21 was working at Rick's and not Cohen's Fashion during -- with  
22 respect to the last four employees or four employers?

23          MR. PLATTA: Your Honor, I understand it would be fair  
24 to show the jury my client's résumé listing all her positions  
25 and places where she worked, but picking and choosing the

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1 application for employment as an airline flight attendant and  
2 expecting to have their position as an entertainer dancer would  
3 be as much unlikely as me applying for a position of a lawyer  
4 with another firm and telling them that I have experience as a  
5 teacher. I wouldn't be hired for this position if that would  
6 be the situation. It's just going to confuse the jury and the  
7 defendants know that very well and that's why they are asking  
8 for this right now.

9 MR. MILLER: Mr. Platta, we concede, we stipulate she  
10 is a dancer. I don't care if it says that she worked at a shoe  
11 store. I don't care if it says she worked as a cafeteria  
12 worker. What it shows is she lied on her application that says  
13 list your last four former employers. Her last four former  
14 employers are other establishments. Cohen Optical goes back 20  
15 years ago, 1988.

16 MR. PLATTA: First of all, not employees, but  
17 employers. Second of all, I will repeat myself. It's an  
18 application for a flight attendant position. Say you would be  
19 applying for a job as a lawyer, you are not going to list that  
20 you were a teacher.

21 MR. MILLER: Does not say the last four.

22 MR. PLATTA: What would you put yourself on the  
23 application for a lawyer position?

24 MR. MILLER: I have nothing else to say, your Honor.

25 MR. PLATTA: You were working at a bookstore. You



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1 would list relevant experience -- employer's experience.

2 THE COURT: I will allow you not to put this in but to  
3 tell the jury that in another application for employment she  
4 listed different employers.

5 MR. MILLER: Can your Honor tell them as well on the  
6 charge?

7 MR. PLATTA: I'm objecting to that.

8 MR. MILLER: Why?

9 MR. PLATTA: The judge already told you. If you want  
10 to do that, do that.

11 MR. MILLER: I'm making an application, but thank you  
12 for ruling on it, Judge Platta.

13 THE COURT: You can do it. I'm not doing it for you.  
14 Different employers were on another -- were on the application  
15 for Rick's.

16 MR. MILLER: For the Excel Aire.

17 THE COURT: Were on the application.

18 MR. MILLER: Application which you are not going to be  
19 able to have an opportunity to see, correct?

20 THE COURT: I don't think I'd add that.

21 MR. MILLER: They are not going to be able to see it. I  
22 want them to know that I'm not misrepresenting it.

23 THE COURT: He's not going to argue with you, so  
24 you're not misrepresenting anything.

25 MR. MILLER: I am not sure what he's going to argue or

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1 not.

2 THE COURT: If he argues anything about it, he is  
3 simply going to say, indeed, the difference were in fact  
4 because of the nature of the employment.

5 MR. PLATTA: Correct.

6 THE COURT: Everybody gets a chance, but it's not  
7 coming in. If you want the rest of it in, you can just cut out  
8 the bottom four lines.

9 MR. MILLER: Your Honor, may I make another  
10 application. I would request that we redact the names of these  
11 three locations and write something that we agree upon that  
12 indicates it's something different than what's on this  
13 application.

14 MR. PLATTA: I object to that.

15 MR. MILLER: By court stipulation. By court  
16 stipulation this is a different employer than the one on Excel  
17 Aire -- on Rick's Cabaret.

18 THE COURT: We are not writing anything. You can  
19 argue that there is a difference between the employment  
20 applications in evidence and another employment application  
21 that for different reasons the Court kept out.

22 MR. MILLER: Okay.

23 THE COURT: He can say what he --

24 MR. MILLER: We can say the Court kept it out. Thank  
25 you, your Honor.

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1 THE COURT: Anything else?

2 MR. COFFEY: Thank you, Judge.

3 THE COURT: See you in an hour or less now.

4 MR. PLATTA: Your Honor, do you want me to e-mail to  
5 your law clerk the research that I did on the 5104, paragraph  
6 5104 of the insurance regarding the economic loss?

7 THE COURT: I thought we agreed the way it works --

8 MR. PLATTA: The jury is not going to get the charges  
9 for threshold --

10 THE COURT: It's over for threshold. I am going to  
11 decide in your favor for threshold. It's not easy for me to do  
12 that, but I can tell you in this instance not to worry.

13 MR. PLATTA: Thank you, your Honor.

14 THE COURT: I think we are finished now. I thought we  
15 finished 20 minutes ago.

16 (Recess)

17 THE COURT: Gentlemen, I've written out what I expect  
18 to hear and no more on the issue that we discussed, so I'm  
19 cutting it in half so that once you've read both, the plaintiff  
20 will get the plaintiff's and the defendant will get the  
21 defendants'. Let them see it all.

22 MR. MILLER: Thank you, your Honor.

23 THE COURT: That's what I expect to hear, but you  
24 don't have to do it verbatim. They have gotten my message.

25 MR. PLATTA: Your Honor, I respectfully ask to note my

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1 exception to the jury verdict sheet regarding the proximate  
2 cause combined --

3 THE COURT: I thought we already agreed that that was  
4 okay. We got to stay on the same table or line or whatever you  
5 call it. Be my guest.

6 MR. PLATTA: Thank you, your Honor.

7 THE COURT: The record will reflect that you were  
8 approving of both the charge and the verdict sheet. And should  
9 you go to a higher authority they will make sense out of all of  
10 your wanderings.

11 Go ahead, bring them in.

12 (Jury present)

13 THE COURT: Ladies and gentlemen, we are approaching  
14 the end of this saga and the way we are going to do it is that  
15 the parties will sum up now, the defendant first.

16 I trust Dennis has taken your lunch orders and in fact  
17 once you have heard the summations you will have lunch and then  
18 you'll come back and we will have a charge on the law, and then  
19 the case will be yours.

20 THE DEPUTY CLERK: I don't have their orders. It will  
21 be quick. I can get it done quickly, no problem.

22 THE COURT: What do you mean, it's no problem? I have  
23 a 12:30 order to show cause.

24 THE DEPUTY CLERK: It will be done.

25 THE COURT: The defendant sums up first. We are ready

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1 to hear you if you're ready to talk to us.

2 MR. MILLER: Thank you, your Honor.

3 Good morning, ladies and gentlemen of the jury. It's  
4 been a long two, two and a half days and I want to thank you  
5 for being here and being patient and hearing all the testimony.  
6 This is the opportunity that we told you about at the beginning  
7 of the trial, the opportunity for us to speak to you again  
8 directly and to tell you what we think and discuss what you  
9 heard. So I promise you I am going to try to be no more than  
10 30 minutes. But I just want to touch, highlight some of the  
11 testimony you heard and some of the stuff that you didn't hear.

12 What did you see and what did you hear? You heard  
13 about prior motor vehicle accidents. Plaintiff told you that  
14 she had a 2001 accident in Los Angeles. She told you that the  
15 ambulance came and that police came. She also told you she was  
16 involved in a chain reaction in 2004, very little details  
17 provided. Not really sure why. For that you have to ask team  
18 Platta. Subsequent motor vehicle accidents that you heard  
19 about, we heard about a March 8 accident of 2007. You also  
20 heard about a March 16 that were confirmed in records from  
21 Rick's Cabaret where she was employed. Rick's Cabaret is not a  
22 party to this action. They are not an interested party. They  
23 are a nonparty. They have employment records.

24 What do the employment records say? What did they  
25 show? You're going to have these records when you go back into

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1 the jury room to deliberate, and I proffer to you that those  
2 records are an incredible piece of evidence. Why is it so  
3 credible and incredible? Because it shows a March 16 accident.  
4 Also, interesting, you heard about the March 8 accident. Was  
5 she in an accident, was she not in an accident, was it a rental  
6 car? You have to decide credibility, whether people are  
7 telling you the truth.

8 I'll tell you this. When you look at Rick's records,  
9 when you go in there, you are going to see that she didn't work  
10 on March 8. You are also going to see she didn't work on March  
11 16, two very important days, two very important reasons. I  
12 submit to you the reason she didn't go to work, she was in a  
13 car accident on both days. March 8, very important day, two  
14 days before her MRI and two days -- four days before her  
15 x-rays.

16 Medical records. No mention of these five motor  
17 vehicle accidents anywhere? Anywhere? Ask team Platta why  
18 they did not tell the medical providers about it. I cannot  
19 give you an answer. We received testimony from every medical  
20 witness about the importance of history, taking a history. Dr.  
21 Davy, their expert, Dr. Davy stated that he believes that  
22 history gives you, as he coined the phrase from a former  
23 colleague of his, that gives you 90 to 98 percent of your  
24 diagnosis and I quote:  
25 "Q. Do you understand if someone is not forthright in the

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1 history and there could be other intervening or succeeding or  
2 preceding or any other type of event, that that could change  
3 causation?

4 "A. I think it can cause. It can change your differential in  
5 your investigational studies. Then the results of those  
6 certainly can change the causality of what you're looking at."

7 Ask team Platta why these histories were not complete.  
8 We also saw testimony from Dr. Crane who said there was a  
9 preexisting degenerative condition that was corroborated by her  
10 own doctors. Her own doctors sat in that chair and said she  
11 had a degenerative spur that has been caused by past trauma. I  
12 submit to you that her injuries were caused in combination of  
13 past auto accidents, maybe it was caused by her figure skating,  
14 jumping, as she said. She was a class A figure skater, jumps  
15 and spinning in the air, hitting the hard ice. Maybe it was  
16 caused by her snow skiing, the double black diamond as she went  
17 30 to 40 times a year out to Colorado or out in the Midwest, as  
18 she put it. Her doctor testified that the body slowly breaks  
19 down as it wears and tears. I submit to you that her athletic  
20 and occupational lifestyle has accelerated her wear and tear,  
21 not this accident.

22 Plaintiff's counsel is going to tell you that  
23 Dr. Crane never looked at an MRI film. He didn't. Ironical  
24 because her own treating doctor, Dr. Davy, sat in that chair,  
25 told you he did a surgical procedure, but he never looked at a

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1 film. He went in there and never looked at a film.  
2 Nonetheless, Dr. Crane relied upon the only neuroradiologist to  
3 take the stand, only one. I did not see plaintiff's  
4 radiologist or neuroradiologist testify. I don't know why.  
5 What would they have said if they stood on the stand? Why did  
6 they call him? You draw the conclusions you want to draw as to  
7 why they didn't have a radiologist. Ask team Platta.

8 We saw a motor vehicle after its impact with the large  
9 garbage truck. You heard testimony that it's 40,000 pounds  
10 with waste. Use your own common sense. We talked about at the  
11 very beginning, your own common sense. Garbage trucks strikes  
12 a vehicle and there is an atomic bomb explosion on the rear  
13 side quarter panel causing such nuclear damage. I don't know,  
14 but that car still drives today. It was a rear-end collision  
15 with body damage. You draw your own opinion as to how  
16 significant that body damage was. Good enough to drive, no  
17 airbag deployment. 40,000 pound truck slides into you and  
18 that's all the damage it did. I submit to you, it wasn't a  
19 significant hit.

20 It was so insignificant she went back to work. She  
21 went back to work. It's not that she took a week off or two  
22 weeks off. This accident, I remind you, happened February 14  
23 at 4:30 a.m. in the morning. February 14, 4:30 a.m. in the  
24 morning. She went to the emergency room. You'll see the  
25 emergency room records, and you'll draw conclusions that she



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1 left the emergency room some time around noon. She ends up in  
2 Colorado on 4 a.m. flight coming back to New York on the 16th.  
3 I don't know if space aliens lifted her up or how she got to  
4 New York after her accident on the 14th, but she made it to  
5 Colorado by the 16th. She was traveling. I submit to you she  
6 was traveling on the 15th on a four and a half to five hour  
7 flight out to Colorado. Her testimony that she was home stiff  
8 is not credible. It's just not credible.

9 I don't know how she got there. Ask team Platta.  
10 Does that sound like the activities of someone involved in an  
11 atomic explosion, going out to Colorado to fly three legs of a  
12 trip? You'll see the records, you'll look at it. She flew  
13 three legs, actually four. If you count the leg to go out  
14 there and then the leg from Colorado all the way back to Islip,  
15 Long Island, from Islip back to White Plains, and from White  
16 Plains, I want to say, back to Colorado again. Yes, back to  
17 Rifle, Colorado. Colorado Springs to Islip, three hours, 18  
18 minutes, the records will show you; Islip to White Plains,  
19 another hour and 24 minutes. This does not include the time  
20 that the plane is on the ground. White Plains to Rifle,  
21 another four hours and 42 minutes, all on the same day,  
22 February 16. Amazing. Guess what? February 17 she was back  
23 at Rick's working. She never stopped. We will talk a little  
24 bit more about her employment and her work records in a moment.  
25 I want to point out -- maybe we will go right now to

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1 her work records. It's important. You're going to see these  
2 documents in the jury room. I ask you, Mr. Diaz asks you to  
3 look at these records carefully. These are the critical  
4 records. These are the records that show that Mr. Diaz is not  
5 the proximate cause of her injuries. I didn't make these  
6 records. Plaintiff's counsel didn't make these records. These  
7 are standalone documents that were taken by employers who are  
8 not parties to this action. You are going to have to look and  
9 read these carefully. You are going to have to look at them  
10 more than once or twice, so take a little bit of time. I am  
11 going to walk you through just a little bit to give you the  
12 flavor. But you will see, for example, you'll see 2/13 at  
13 11:03 in the evening, that's nighttime, she started and there  
14 is no punchout. No one testified to a punchout. That's the  
15 beginning of the shift.

16 The accident happened at 4:30, which would be the  
17 following day on the 14th. We know what happened on the 14th.  
18 Next thing we know is that on the 15th, it's my position she  
19 went to Rifle, Colorado Springs. It's my position that after  
20 flying three legs she made it back to New York on the 17th.  
21 She had to make it back to New York on the 17th. If you look  
22 at the records, you are going to see she probably flew back on  
23 the 17th, so five legs in two days, five legs in two days. She  
24 ended her trip in Rifle, Colorado and she took off at 8:22 p.m.  
25 from White Plains. She is in four plus hours, 17th she had to

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1 fly back. She worked on the 17th. She flew and worked on the  
2 same day.

3 Then you are going to take a look at the 18th and  
4 19th. You are going to look at the flight log. Flight log is  
5 a little different to look at and you are going to have to take  
6 a careful look at it because you will see the departure codes,  
7 the arrivals, those are the different airlines and the times,  
8 and I'll show you. Take a careful look on the 16th. It says,  
9 KISP, KHPN. What you are going to find out is that -- on the  
10 19th, rather. 16th we have already talked about. 19th it says  
11 KPBI and then it says KASE. That's the 19th. And you will  
12 look and you'll see times.

13 What it's going to show you is she went to West Palm  
14 Beach, Florida, departed 3:32 p.m. and she was flying to Aspen,  
15 Colorado, going back to Colorado for another four hours and 48  
16 minutes. Wait, folks, there is more. That's February 19. Her  
17 trip started in Florida. How does she get to Florida? If the  
18 trip started in Florida, she had to fly there. And she worked  
19 the night before of the 17th, so she had to fly out on the  
20 18th, maybe the 19th.

21 It also shows on the record here that on February 20,  
22 at 9:15 p.m., she flew to Lincoln, Nebraska, one hour and 30  
23 minutes. February 20, you'll see that she went to Lincoln,  
24 Nebraska at 11:39 p.m., back to White Plains for two hours and  
25 36 minutes. And then she went on February 21, it says early in

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1 the morning, White Plains. She flew back to Islip. That is on  
2 the 21st. That is almost five hours plus an hour and a half,  
3 plus two and a half hours. I'm not Archimedes. I'm not the  
4 best mathematician. But I will tell you that nine hours of  
5 flight -- ten hours of flight all in that 24-hour period.

6           Guess what, folks. On the 22nd -- go back to Rick's.  
7 On the 22nd, she made it back to work. There we go. She made  
8 it back to work. Now, the accident happened on the 14th. I  
9 submit to you she worked on the 15th, she worked on the 16th,  
10 she worked on the 17th, she had to fly on the 18th, she worked  
11 on the 19th, she worked on the 20th, she worked the 21st, and  
12 she worked the 22nd. She worked the 23rd, she worked the 27th,  
13 she worked the 28th, she worked the 7th. Oh, wait. Do you  
14 notice what you don't see? You don't see March 8. Why don't  
15 you see March 8? Because she had another accident. She had  
16 another accident.

17           MR. PLATTA: Objection.

18           THE COURT: Overruled.

19           MR. MILLER: Take a look. I am going to show you what  
20 else you don't see. You don't see March 10 and 12. Why?  
21 X-rays and MRIs. Next day is March 15, March 17. Wait a  
22 minute. Do you see March 16? I don't see March 16 either.  
23 Why is that missing? If you look up to March 29, there is an  
24 adjustment made. Why? Because it says, no fee, 3/16, in a car  
25 accident, a car accident that she says didn't happen or she

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1 said, counselor, if you say so. I submit to you I say so.

2           Why would they have that in her records? Either she  
3 is not telling them the truth or she is not telling you the  
4 truth. I tell you, it doesn't pass a smell test. These  
5 records are for you to review and I'm not going to belabor  
6 them, but they are very important. You will see that it goes  
7 March 20, March 23, March 24, March 28, March 29, March 30,  
8 April 2. April 9 is when she met Dr. Babu for team Platta.  
9 April 12, April 14, April 17, April 18 was her last day of  
10 work. April 18. Guess what happened on the 20th. April 20  
11 she met Dr. Davy, she never went back to work. She never went  
12 back to work. That was it, over. May 19, she had her surgery  
13 by Dr. Babu for the lawsuit which was filed or filled out on  
14 May 31.

15           You saw MRIs and x-rays taken immediately after the  
16 March 8 accident. The only radiologist that you heard from  
17 testify, Dr. Rothman, what did he say? He said these x-rays  
18 and MRIs show a small cervical herniation and a small lumbar  
19 herniation that were not impinging on the spine and were not  
20 cause objective findings of pain. What did their radiologist  
21 tell you? Silence is deafening because him or her didn't take  
22 the stand. Could have called him, never did.

23           What else did Dr. Rothman, with the wonderful  
24 credentials of 35 plus years, tell you as a neuroradiologist  
25 specialist? He told you that the T2 sequence at L5-S1 is dark

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1 in color, which is textbook indicative of an old herniation.  
2 It's not new, folks. This is a preexisting result. There is  
3 subsequent trauma. There is March 8 or subsequent trauma as  
4 March 16, or there is another accident she testified to on July  
5 29, I think was the date, of '07. A lot of other causes. I'll  
6 tell you what wasn't the cause. Mr. Diaz was not the proximate  
7 cause of her injuries.

8 You saw a lot of fancy artwork. Do not be fooled by  
9 the smoke and mirrors. You're smarter than that. Testimony,  
10 credibility and the actual films; not the artistic depictions,  
11 the actual films. And the testimony and the credibility of the  
12 witnesses, that's what you should decide upon.

13 You did not hear from the sketch artist and you did  
14 not hear at all with any radiologist disagreeing with  
15 Dr. Rothman.

16 Who else did we not hear from? We did not hear from  
17 Dr. Villafuerte, did not hear from Dr. Kaisman. Where are  
18 these doctors? These are the first two doctors she saw nine  
19 days, ten days, 12 days after the accident. He didn't put them  
20 on the stand. I can't explain to you why he didn't. I'll tell  
21 you this. Team Platta has a lot of explaining to do.

22 Talked to you about independent documents before,  
23 talked about these employment records, talked about the airline  
24 records. What other independent documents do we have? We have  
25 an ambulance call report. What did that call report say? It

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1 said, no LOC, no loss of consciousness. That's contrary to  
2 what she told you. It's also different than what she told her  
3 treating doctors after this photograph taken with tape measure  
4 by God knows who took those photos.

5 The ambulance call report also said she is alert,  
6 oriented times three. She walked to the ambulance. She got up  
7 and walked to the ambulance. Why is this significant? It's  
8 not my witnesses telling you this. Certainly his witnesses  
9 aren't telling you this. The document speaks for itself.

10 Whose observations are you going to give more  
11 credibility to, the EMT, who has absolutely no vested interest  
12 in this case, who goes to the scene contemporaneously and  
13 renders emergency first aid. Ask team Platta why he didn't  
14 call the EMTs. Why didn't he put them in the box. I'll tell  
15 you why he didn't. Because he didn't want you to hear what  
16 they had to say. They come, they sit down in their EMT uniform  
17 and all their badges and stuff, and they say, I've been doing  
18 this for years. What else are they going to say? They are  
19 going to testify according to their report. He didn't do it.  
20 He didn't put them on the stand. He didn't call the police  
21 officers. You look at the police report when you're back  
22 there, take a look. Ask team Platta why he didn't call the  
23 police officers. There is only one reason, he doesn't want you  
24 to hear what they have to say.

25 She left the hospital room after the emergency room

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1 visit. After a 40,000 pound truck hit her, she left the  
2 emergency room, walked out at noon. She wasn't admitted to the  
3 hospital. Then she got on a flight. Some atomic bomb, boom.  
4 Some atomic bomb.

5 THE COURT: Can you keep a little lower voice?

6 MR. MILLER: Sure.

7 MR. PLATTA: Thank you, your Honor.

8 MR. MILLER: Sure, your Honor.

9 Let's take a look at team Platta. Let's take a look  
10 at this. Think about this. We saw that Dr. Krishna  
11 introduced -- this is going to take me a second. We saw Dr.  
12 Krishna introduce Mr. Platta to Dr. Davy at a Christmas party.  
13 Okay. And he said, and I quote, this is a new young attorney  
14 that we work with, work with. They work with him. Let's see  
15 if I get this team roster correct. Dr. Davy leases space from  
16 Dr. Krishna, Dr. Krishna refers Dr. Davy over 100 patients a  
17 year. And Dr. Babu meets with patients in Dr. Kaisman's office  
18 and Dr. Kaisman is the doctor that wouldn't testify here, is  
19 not here. Dr. Krishna refers to Dr. Babu and let's him use his  
20 office to meet with them, but doesn't keep his own file. And  
21 let's not forget Dr. Krishna, the one with the physical therapy  
22 where she receives her physical therapy, and the chiropractor,  
23 they are all in the same building. What a team. What a team.  
24 Dr. Babu testified, and I quote, so I'm the final. I'm the  
25 final guy.



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1           Script was written, the dye was cast on April 9, which  
2       was 54 days after this accident. After one consultation in Dr.  
3       Krishna's office, Dr. Babu says she needs surgery. She never  
4       saw him again. The next time she saw him, she was on the  
5       table. This is three months. So much for conservative  
6       treatment. You heard him, he's a conservative doctor,  
7       conservative treatment. Do you remember these questions,  
8       folks. These were asked to Dr. Babu about second opinion:

9       "Q. Did you recommend at any time another surgical opinion?

10      "A. No, sir.

11      "Q. Why is that?"

12           Back surgery we are talking about, folks.

13           Why is that?

14           Well, I'm of the opinion, because if somebody comes to  
15      me, I don't tell them unless I don't know what I'm dealing  
16      with, unless I don't know what I'm dealing with. Otherwise,  
17      folks, he's a doctor, a vital doc.

18           We learned that Dr. Davy performed a surgical  
19      procedure that is not accepted in the medical community. We  
20      heard that from Dr. Crane, who spent nearly 40 years at Lenox  
21      Hill Hospital and said that the nine doctors there that do  
22      these type of interventions would love to have something that  
23      would work, such as a striker device. We are talking about a  
24      device that is not accepted. You didn't hear Dr. Babu give any  
25      credence to that surgery. Dr. Babu says -- or procedure. It's

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1 a 12-minute procedure under local anesthesia, if you so choose.

2 Dr. Babu never talked about it or gave it credence.

3 Why? It's not generally accepted, I offer to you, in the  
4 medical community. Dr. Crane said, they would love to have a  
5 procedure that worked so well, but it doesn't, the striker

6 method. Dr. Davy, who did this procedure, who is not a  
7 surgeon, who is an anesthesiologist, does this procedure  
8 without ever looking at films and tells you that his training,  
9 his training on this device was for one or two days some time  
10 in Boston. It's important. Dr. Davy does this procedure.

11 If you look at the records in December, Christmas is  
12 in December. Team Platta met with Dr. Davy in December at the  
13 Christmas party. A week or two later, guess what? Dr. Davy  
14 was doing this procedure on Ms. Frometa. They met. They are  
15 part of the team. They work together.

16 I think the one thing that all of the doctors that  
17 came in here -- I know you heard from a litany of them. They  
18 all agreed on a couple of basic principles. They all agreed,  
19 and they couldn't refute, that 90 to 95 percent of all  
20 herniations will either reduce in size or go away within one  
21 year, one year. New England Medical Journal. One year. Yet,  
22 we received testimony from doctors who disregarded this and  
23 went with the conservative treatment where they proceed to the  
24 operating room within three months.

25 We received testimony from Dr. Babu who said -- he

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1 said, there is no need for further surgery. Yet, Dr. Davy does  
2 this procedure. We received testimony from Dr. Babu, who  
3 performed the surgery, that she doesn't need much medical care  
4 or health care or toilet seats or grabbers or reachers. They  
5 filled out the form. You'll have the form back there. I don't  
6 want to belabor. You'll look at what Dr. Kincaid or Mr.  
7 Kincaid had. Dr. Kincaid sent him a form and Dr. Babu's office  
8 filled it out and said, if you want to do physical therapy four  
9 times for the year, go ahead. By no means did Dr. Kincaid,  
10 Mr. Kincaid, give that any consideration.

11 We received testimony from Dr. Crane that this  
12 accident was not the cause of these injuries and that plaintiff  
13 had significant unrelated preexisting degenerative disease,  
14 degenerative changes. We received testimony from Dr. Rothman  
15 that the motor vehicle accident is not the cause of these  
16 injuries and that the plaintiff had significant, unrelated  
17 preexisting degenerative changes.

18 We received testimony from Dr. April that the life  
19 care plan relied upon -- relied upon erroneous numbers. Think  
20 about it, folks. The building is only as strong as its  
21 foundation, garbage in, garbage out. Dr. Babu told you that  
22 this stuff wasn't necessary. We talked about -- I think Dr.  
23 Babu, if you add up the numbers, he said we received -- he said  
24 after looking at the questionnaire and talking to us and  
25 talking to us and said it was about \$5,000 in the first year of

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1 treatment.

2           You heard from Dr. Kincaid. What did Dr. Kincaid say  
3 when you look at the numbers? First he said that you need an  
4 economist to understand them. You need an economist for  
5 present value and you need to figure this all out and put in  
6 the present value in our discounts and find out what fee  
7 schedules are, because there are fee schedules but, yet, team  
8 Platta, do they give you an economist? You didn't see an  
9 economist on that stand at all. There is no economist  
10 testifying. Certainly, Mr. Kincaid is not qualified.

11           What did Mr. Kincaid do with these numbers? Mr.  
12 Kincaid thought about Dr. Babu. He said he gave it  
13 consideration. So what kind of consideration? He didn't give  
14 it a footnote in his report. The neurosurgeon, NYU, did the  
15 surgery that is not even given consideration in the report, not  
16 even a footnote. What he did was, he considered it addition by  
17 subtraction of Dr. Babu since he did not agree with his  
18 conclusions. That's what he did, addition by subtraction.

19           We saw Mr. Kincaid, who was hired on the eve of the  
20 original trial date, that, folks, she needs to go to the gym,  
21 \$18,000 a year with a personal trainer. A gym -- I would like  
22 to go to a gym for \$18,000 a year, personal trainer. How does  
23 he come to know his numbers, his conclusions? He comes with it  
24 by -- I think it's 52, 53, 54. You can do the numbers. By  
25 calling randomly, treating -- other facilities in the New York

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1 City, Manhattan area, he called New York City and spoke to a  
2 receptionist to ask what they charge. Now, only out of 50  
3 something, you only got the first name of two of the people he  
4 spoke to. Doesn't have the date he spoke to them. He does  
5 have the date. I apologize. What he doesn't have is a fax  
6 confirmation of the costs, and he doesn't delineate between  
7 what we call -- I don't know what to call it. Let's think  
8 about this thing. Dr. Davy stood on the stand and says, under  
9 the fee schedule Mr. Kincaid didn't give you or didn't discuss  
10 with you, didn't give you any detail, for this \$400, he gets  
11 \$71. That's about 17 percent of the charge. That's what he  
12 gets paid. But the number you're looking at Mr. Kincaid's  
13 report, he says manufacturer's suggested retail price, folks.  
14 It's like the Price is Right. That's what it is. No one has  
15 ever paid those prices, I submit to you. But those are the  
16 numbers that he put up there. Would you like to spin that  
17 wheel.

18 You are not going to see those faxes that document  
19 these numbers. We received testimony that she was  
20 significantly injured, she depends on her aunt and her mother  
21 and her family and everybody. Folks, I didn't see them in the  
22 courtroom testifying about what she does for them or they do  
23 for her. I live here. Not one family member took that stand  
24 to testify on her behalf, not one. Ask team Platta why he  
25 didn't call them. Ask them what they would have said if they

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1     were in that box. They know she had five or six past, future,  
2     and subsequent accidents. They know what treatment she had or  
3     didn't have. I don't know which treatment she had or didn't  
4     have. There is HIPA laws out there. I don't know. I can't  
5     tell you. I'll tell you this. They could have testified.

6             You know, what else didn't we see from team plaza?  
7     They keep showing on this big giant screen photos of this car.  
8     We didn't see a biomechanic take the stand, someone who is  
9     going to come in and say 40,000 pounds crashing into, on a  
10    snowy night, in the back of her car. Folks, use your common  
11    sense. 40,000 pounds and that amount of damage. That screen  
12    is quite appropriate. It shows nothing. Ask him why he didn't  
13    bring in the biomechanic. Ask him why the airbag didn't go  
14    off. Ask team Platta to explain these. Didn't call the EMTs.

15            You heard the judge earlier at the beginning of trial  
16    talk about burdens of proof. He told you about it, so I am  
17    going to say it again. It's not the defense side to prove.  
18    It's plaintiff's case to prove. And I submit to you he didn't  
19    prove that Mr. Diaz was the proximate cause.

20            What else don't you see? The records. The records  
21    that are very significant are the employment records and you  
22    have the employment records from Excel Aire Lines and you are  
23    going to look at this. I don't want to take too much time  
24    because these will be in the jury room with you. But nowhere  
25    does it say -- first of all, most important, let's just look at

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1 the date. Try to get out there. The date on her application  
2 is February 16, the date of her new job. She had to get out to  
3 Colorado for her new job. That was exciting, folks. Guess  
4 what. Is she lying to them, is she lying to you? She didn't  
5 tell them about this significant accident if you believe that  
6 it was the proximate cause of her injuries.

7 Why did she tell them? I submit to you, because it  
8 wasn't so significant, she went out and she worked. You know  
9 what, she got on a flight. Think about it. Flew how many  
10 hours to L.A., three different legs, servicing people, being  
11 ready for emergency care, emergency situation, opening doors,  
12 rendering first aid, rendering emergency care. I would be hard  
13 pressed -- it would be shocking to find out if we find out that  
14 she was really injured and she was willing to take on that  
15 role.

16 You will also see on the application, talk about  
17 credibility, and we never made -- I don't believe you've heard  
18 any issues by any of the witnesses about her profession as a  
19 dancer. It's not an issue. It's not an issue to the defense.  
20 We have made it no issue. But what I will tell you is an  
21 issue, you will see on the application for employment, Cohen's  
22 Fashion Optical, you'll see Economy Best Vision, you'll see  
23 Private Charter Jet, you'll see MGM Mirage.

24 But, I'll tell you, what you don't see, you don't  
25 see -- for other reasons that's really not for the jury's

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Summation - Mr. Miller

1 knowledge -- that there is a different employers listed on the  
2 employment form by Rick's Cabaret. And the Court has admitted  
3 into evidence certain parts of Rick's, but the Court has given  
4 me permission to tell you that those employers that are listed  
5 on Rick's Cabaret, her employment, differ than the employers  
6 that are listed on here. You can go into that jury room  
7 knowing that they don't match, they don't match.

8 Again, her credibility. She is flying on airlines,  
9 flying on airlines, and she has got to be truthful. She  
10 certifies: I certify the facts contained in this application  
11 are true and complete. Former employees. Over here. List  
12 below the last four employers. She wasn't honest. She is not  
13 truthful. This is about credibility, folks, credibility. I  
14 don't think she has been too credible to you. I don't think  
15 team Platta has been too credible to you.

16 You know, talking about what else is missing. If you  
17 take a look -- we did not see single MRI or x-ray taken since  
18 March 12, 2007. She has gone through all of this treatment  
19 over the past 15 months of her life, but, yet, we do not see  
20 any subsequent medical diagnostic films other than the one that  
21 might have been taken during the surgeries or procedure,  
22 discogram. Isn't that odd, don't you think? You have these  
23 back procedures. You think you would have more. Why not? You  
24 got to ask yourselves. I don't know. Are they setting a  
25 benchmark for the other three subsequent accidents for



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Summation - Mr. Miller

1 subsequent lawsuits? I don't know. I'll tell you this. It's  
2 kind of odd. Team Platta at work. Maybe they don't want you  
3 to know. Maybe after a subsequent accident her position  
4 worsened. I don't know. But you think, after you go and after  
5 these procedures, at least once in 15 months you would have an  
6 MRI or an x-ray taken? None, zero, nada. Ask team Platta.

7           You did not see a complete and accurate history given  
8 to her medical care providers, which means these findings are  
9 merely speculative and, thus, there is no position to determine  
10 proximate cause of this accident. In fact, it's quite to the  
11 contrary. Here we have the woman showing no signs, but right  
12 back to work. No signs of slowing down. You'll see. Nine  
13 days in a row, straight. I'm not talking sitting behind a desk  
14 job. Nine days in a row, travel up and down. Use your common  
15 sense. That's a lot of work, lot of running, and, I'll tell  
16 you, there is absolutely no signs. The evidence shows just the  
17 contrary, that Mr. Diaz was not the proximate cause.

18           You are going to see a form that the judge is going to  
19 explain to you later on. They are going to ask you, that's the  
20 very first question if he was the cause. I submit to you he is  
21 not. He's not.

22           Trial, this trial, is about taking responsibility and  
23 credibility. Anything else? Yeah. Wait a minute, she says,  
24 or team Platta says about these injuries, but Mr. Kincaid, he  
25 took the stand and he told you about his certifications. He

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Summation - Mr. Miller

1 told you that part of his certification, that he spends the  
2 majority of his time as a vocational rehabilitation specialist.  
3 What does that mean, folks? And he is testifying for  
4 plaintiffs, as a hired gun for the plaintiff. You would expect  
5 that he would testify sitting there, she is unemployable, I  
6 can't employ her, I can't give her a job, there is nothing she  
7 can do. Did you hear the vocal rehab specialist, the expert,  
8 testify to that? I proffer to you, she is employable. She has  
9 been employable this whole time. If she is not employable,  
10 it's certainly not as a result of this accident.

11 The trial is about taking responsibility and  
12 credibility. Mr. Diaz, he took responsibility for the events  
13 on that snowy night when he slid into Ms. Frometa's car. On  
14 behalf of Mr. Diaz the defense admitted and conceded  
15 responsibility for the happening of this accident. But they  
16 vehemently deny that this accident was the proximate cause of  
17 her treatment.

18 We met in jury selection and I had the first  
19 opportunity to speak with you. And you promised me when you  
20 came in that you would use your common sense and that you keep  
21 an open mind. Those are the two things I asked you. I didn't  
22 have many questions. Then I gave you a little hypothetical and  
23 I talked about a vase. No way am I saying that this trial is  
24 as simple as analogy, but it's important. Because what about  
25 the vase. I told you about it and we went through a series of

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Summation - Mr. Miller

1 questions. I'm telling you now, it's my position, our  
2 position, we did not break the vase. We didn't break it. We  
3 shouldn't have to pay for it. If it was broken, if it was  
4 dropped by somebody else afterwards and it was broken, it needs  
5 to be glued back together, but not with our glue.

6 It's okay to feel sympathy for Ms. Frometa, but do not  
7 confusion sympathy with causation. Plaintiff has failed to  
8 meet his burden. Let Mr. Diaz go home with a clear conscience.

9 Mr. Diaz thanks you for being here, spending three  
10 days to hear this, and I thank you. I know you have taken time  
11 out of your busy schedules to be here. When I sit down, you  
12 will not hear from me again at all. I ask, when you go into  
13 that jury room, keep an open mind and think about what I've  
14 said to you. Nothing I've said is evidence. Keep an open  
15 mind, think about the ideas that I put out there and the  
16 reasons and what team Platta has proffered or what they have  
17 not proffered and whose burden it is. Because when I sit down,  
18 Mr. Platta is going to stand up and I need you to keep thinking  
19 about what team Platta has done.

20 Thank you, ladies and gentlemen of the jury.

21 THE COURT: Mr. Platta.

22 MR. PLATTA: Thank you, your Honor.

23 Good afternoon, ladies and gentlemen, members of the  
24 jury. You have heard a lot about team Platta. I submit to you  
25 it's not about any team Platta. It's me and my computer,

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Summation - Mr. Platta

1 pretty much. And I submit to you that what counsel told you is  
2 wrong, wrong for one reason. He wanted to distract your  
3 attention from the case and put it on something else. That  
4 shouldn't happen. This is the day in court when my client --  
5 I'm an assistant here. I'm just telling you the facts of the  
6 case. That's all I'm here for. This is no magic team Platta.  
7 There is just my client, who had an accident, in which this  
8 defendant drove recklessly, and it's untrue what the counselor  
9 told you that they admitted liability in this case. It was  
10 Judge Baer who decided that you don't have to waste your time  
11 on nonsense, on the fact that this defendant didn't want to  
12 admit that he was responsible. Honorable Baer made a decision,  
13 it wasn't admitted.

14 Now, let's look a little more at this defendant who  
15 just happened to drive a very heavy truck, 40,000 pounds. And  
16 if my client uses the word atomic bomb, it's the best way she  
17 can express it. And are you surprised that she actually uses  
18 this word when you see her truck, when you see the damage to  
19 this car, and it wasn't shown to you by defendants because had  
20 it been done by them, you probably wouldn't see it at all.

21 I apologize one moment.

22 You can see the pictures of the car. You can see what  
23 kind of damage does directly between a truck to another truck.  
24 Remember, this is not a small car. My client was driving a  
25 Toyota 4 Runner. It's a heavy SUV. In order to destroy this

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Summation - Mr. Platta

1 car like that, the impact must have been huge. An atomic bomb  
2 is probably a good expression. We have a jury of females and I  
3 think you actually understand what she means by atomic bomb  
4 when you get this kind of damage to your car. Believe me, had  
5 this been a regular car, small sedan or anything less heavy  
6 than a four-by-four Toyota 4 Runner, I don't think she would be  
7 walking here. I think she would not be with us today. The  
8 defendants want you to forget that this is what happens after  
9 the car is being hit by a 40,000 pound truck.

10 And it's not a coincidence. The defendant was  
11 negligent. The defendant didn't pay attention. He couldn't  
12 stop because, you know what, who cares. I'm in a big truck.  
13 What do I care? I am not going to get hurt. Right, Mr. Diaz?  
14 You don't care. You were paid to come here, so who cares.

15 MR. COFFEY: Objection.

16 THE COURT: This is the second time that the parties  
17 have the opportunity to come in front of you and provide a  
18 narrative. So unless I find a terrible objection and you find  
19 it and bring it to my attention, I would rather let each side,  
20 as indeed happened with you, tell their stories, since this is  
21 the first and last time they have to tell it.

22 Overruled, I guess is the ruling.

23 MR. PLATTA: Thank you, your Honor.

24 I want you to remember that we are not here because of  
25 Ms. Frometa's willingness to bring the lawsuit because she

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Summation - Mr. Platta

1 actually told you, I had prior accidents and I never sued  
2 anyone. I had accident, fender bender, I never sued anyone.  
3 She did sue someone who freaking make a hole in her car, sent  
4 her to the hospital, emergency room, where you saw yesterday,  
5 the pain scale, 9 out of 10, the doctor was lying on the stand.

6 You saw that she was treated. You saw all the  
7 exhibits. And it wasn't prepared by defendants. It was  
8 prepared by myself because I have to prove to you that she  
9 sustained very serious injuries.

10 Now, defense counsel used the word, the proximate  
11 cause in relation to his client and he was partially right that  
12 Mr. Diaz could not be the proximate cause, but there is a  
13 difference between the proximate cause and a proximate cause  
14 and the judge will explain the difference because in the charge  
15 that he's going to read to you, he's going to say that any  
16 proximate cause could be one of the reasons to sustain such  
17 injury.

18 So, basically, what it means, it doesn't necessarily  
19 have to be one reason. It's enough that he's one of the  
20 reasons, he doesn't have to be the reason. So, for example,  
21 all the doctors agreed, my client had some degenerations in her  
22 spine. But there was also a herniation. All of them agreed  
23 she has a herniation in her spine. Some of them told you, her  
24 treating physicians told you that she had radiculopathy in her  
25 spine, neck and back, prior to surgeries and following the

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Summation - Mr. Platta

1 surgeries. What does it mean? She still has numbness,  
2 tingling sensations, pain in her spine radiating in to her  
3 arms. She can't act like we do. Understand that we might not  
4 be able to describe the pain, but the person who actually goes  
5 for pain, she is the only one that can say that.

6 all these exhibits can only try to picture them, but  
7 we actually have to feel for her in order to understand what  
8 she is going through. And the defendants, definitely Mr. Diaz,  
9 didn't agree with her on February 14 when he smashed her. He  
10 didn't pay attention, he didn't care, what the heck, it wasn't  
11 a big car, nothing happened to him. As far as I can see.

12 Now, the defendants told you, defendants' counsel told  
13 you many times that the prior accident, subsequent accidents,  
14 were -- had anything to do with this accident and this injury.  
15 Did he show you anything? It is untrue for him to say that  
16 it's for me to show you some kind of evidence that doesn't  
17 exist. I have showed you everything. I believe that jurors  
18 have to have full disclosure of documents in order to make  
19 decision, whether they are good or bad. Sometimes, like with  
20 the employment records, I was objecting to that because of the  
21 amounts that my client was making or paying and this is not  
22 part of the lawsuit, but you will get the employment records  
23 anyway so you can look at them. You will see she was a  
24 hard-working person. She didn't stop working at the time of  
25 the accident. I told you at the beginning, she doesn't want to

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Summation - Mr. Platta

1 be a burden. She didn't bring any prior lawsuits. She was  
2 fine up until February 14. And on that magic day, this  
3 defendant made us all meet today in court. And it wasn't my  
4 client's idea.

5 I submit to you that none of us here in this courtroom  
6 would want to go through what she went through during last year  
7 and a half. As much as it sounds crazy, for defense counsel  
8 and his witnesses was to testify and say that everything that  
9 she went through was because of something else. If you look at  
10 the MRI films, reports, that are in evidence, you can have a  
11 look at them, you can clearly see that all the MRIs were  
12 actually taken prior to the time of the accident. And you can  
13 review them yourself at the time of your deliberation.

14 This is, for example, the report of the MRI from  
15 Standup MRI of Manhattan, dated 3/30 of '07, prior to any kind  
16 of March 16 accident which she described to you what happened  
17 then. She didn't tell anyone that she needs further treatment.  
18 She was treating only for February 17. And I will tell you  
19 why. Let's think about it. What do you do when you have an  
20 accident? You go to the emergency room, she was taken to  
21 Cabrini by ambulance. She was shaken. I think it's pretty  
22 normal. She was also released a couple of hours later after  
23 CAT scan of her head. They were actually suspicious about what  
24 happened in the car because of damage.

25 Now, if you think of that, she went afterwards to Dr.



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Summation - Mr. Platta

1 Villafuerte, and you have the records to review. The fact that  
2 he didn't testify, how many doctors does plaintiff have to put  
3 on the stand to make his or her case? It's not about numbers.  
4 You have the evidence to review. There is full disclosure.  
5 You can look at the records.

6 The jurors, in front of you, you can see the first  
7 page of the report from Midtown Medical Practice, PC,  
8 Dr. Villafuerte's office. You see the date, February 23. I  
9 submit to you that Ms. Frometa actually seeked medical  
10 attention against what the defendants' attorney told you. She  
11 seeked medical attention right away. As soon as she felt, I  
12 cannot go forward without treatment, she didn't go at the  
13 beginning. She said, I don't want to be a burden, I want to  
14 have normal life, but I don't want to be a burden.

15 Now, this shows you, together with the MRI films,  
16 before any other subsequent fenders benders, that what defense  
17 counsel told you was actually done. But I will submit to you  
18 that at the end of my summation it's going to be up to you to  
19 decide who was telling you truth, and I will submit to you that  
20 I don't want you to listen to me or to defense counsel, but  
21 listen yourself to what you heard on the stand yesterday or the  
22 day before yesterday. Counsel can say whatever they want, but  
23 the actual evidence speaks for itself. This is part of it. It  
24 shows you treatment was waived prior to anything subsequent  
25 that happened to her in her life. Can you penalize someone who

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Summation - Mr. Platta

1 is going coming back to work?

2 When I was listening to my client's testimony, when  
3 she talked about her being back to flight attendant work, her  
4 eyes were bright. This was something she wanted to do. It was  
5 her chance in life to stop dancing, to become someone that she  
6 wanted. She wanted to do flight attendant. She wanted to fly  
7 as much as she can. She was flying until she had to take the  
8 test, safety test for passengers. She couldn't pass this test.  
9 At the time when she came back to work she thought, well, I  
10 think I can do that because it's easy, I can carry one flight  
11 person, 16 maximum per plane, not heavy carriers, and she was  
12 doing that for few days.

13 And the test came in, done. She wasn't able to do  
14 that again. And I submit to you that you saw the films, the  
15 MRIs, you saw the inside depictions of the surgeries. This is  
16 not artwork only. Those doctors who were here, they testified.  
17 They are the accurate representation of the actual procedure,  
18 what it means to you. It means that this is evidence. We can  
19 take them -- you can take them into your deliberation and I'll  
20 ask you to do that. You can review the pages that we actually  
21 blew up. Those doctors told this person who was preparing this  
22 exhibit how to do that. They exactly told them, yes, this is  
23 the way I did it, this is the way I put the scalpel, this is  
24 way I pulled the muscles from the pack, this is the way I  
25 actually inserted instruments to remove the disk; before

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1 removing the disk, to cut the spine, to cut the vertebra.

2 If you yourself being on the operation table and being  
3 open from the back and there is a drill going to your spine to  
4 make space for instruments, and this drug makes a hole, it will  
5 never heal. It's a hole that's going to stay there the rest of  
6 her life. The spine is not the same anymore. The spine is  
7 weak. Now remember, not only the spine is weak, but the disk  
8 that was removed, the disk that was causing the pain had to be  
9 cut. So that means that the disk space between the vertebra is  
10 different now. She is going to have a lot of problems in the  
11 future. She is going to need a lot of medical care and  
12 attention. That's why I decided to hire life care expert.  
13 Yes, he was absolutely hired, but he was hired to put the  
14 numbers together, not to give you an opinion about whether she  
15 needs the treatment or not because his opinion was actually an  
16 opinion of the doctors, not just one, and you've heard Dr. Davy  
17 testifying to you why one doctor's opinion is not sufficient.  
18 Because that plan would not be life care plan. That would be  
19 the life care plan of Dr. Babu or Dr. Crane, who said she  
20 doesn't need anything.

21 Let's think for a second about Dr. Crane. You've  
22 heard all three of them testifying yesterday. And Dr. Crane  
23 didn't do a back surgery for the past ten years, yet he's an  
24 expert on doing spinal surgeries. Yet he can tell you that  
25 striker device that was used to put a needle through my

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Summation - Mr. Platta

1 client's throat to get to her spinal herniation was not  
2 necessary, that this is not approved by the medical community.  
3 Who is he to tell you that? He didn't do surgery for the spine  
4 for the last 10, 15 years, whatever his testimony was.

5 I submit to you that this striker device is actually  
6 FDA approved. It's completely fine to use it. Doctors  
7 commonly use that type of device. In anesthesia, in pain  
8 management, they do that. The defendants want you to think  
9 that something happened to my client during her treatment, or  
10 that something happened to her prior to the accident or  
11 subsequent to her accident. I submit to you that these fine  
12 attorneys, great attorneys from a great law firm, they didn't  
13 show you a scintilla of evidence that they didn't find out for  
14 year and a half to contradict my client's statements regarding  
15 her injuries and proximate cause of the accident.

16 This defendant who is sitting right there, Mr. Diaz,  
17 created on February 14 of '07, was the proximate cause, a  
18 proximate cause which means, the degenerations in the spine,  
19 they were there. No one says anything else. But the  
20 herniation and symptomatic treatment and symptomatic pain  
21 started from the accident on February 14, '07. Why? Because  
22 there is nothing else. It will be up to defendants to show  
23 otherwise. My case is basically to prosecute the evidence and  
24 tell you what happened. If they say something else happened, I  
25 submit to you that they would have to show you what is

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Summation - Mr. Platta

1 significant.

2 THE COURT: Maybe you would like to go outside.

3 MR. MILLER: I apologize.

4 MR. PLATTA: I submit to you there was nothing else  
5 that you have seen and it wasn't because of me. I submit to  
6 you that this firm, these attorneys, are smart enough to bring  
7 any live person who can testify against my client, anybody,  
8 anyone. They will find the person, they will find a document.  
9 You know what? In this case they didn't actually have to do  
10 that. Because everybody was disclosed. In the federal court  
11 we have to put all the evidence in on the table, everything we  
12 know, and this is what we have in our system. When you go to  
13 the deliberation room, please look at the records, please look  
14 at the charts. You have full access to all medical records,  
15 anything that you need, but also remember defendants have to  
16 put some kind of defense to this case, they have to present  
17 their interests. This is a company. They have to protect the  
18 company. Because Mr. Diaz was employed by the company at the  
19 time of the accident and it's actually the company who is  
20 responsible for the accident, not himself. He is not going to  
21 go to jail. Anything won't happen to him, and he knows it. He  
22 knows what he did to my client on February 14, don't you,  
23 Mr. Diaz?

24 Going back for a moment to the treatment of my client,  
25 let's start with Cabrini. We have heard testimony yesterday

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Summation - Mr. Platta

1 from the doctors, from Dr. Crane, that the pain was actually  
2 mild. I have shown you this portion of the report that  
3 actually we are discussing damage and actual pain that my  
4 client had following the accident. And you saw the scale of  
5 the pain, of her opinion, which was right here. This discusses  
6 loss of consciousness, which is apparently what the defendants  
7 were disputing as well. They told you, she liked her doctors,  
8 about losing consciousness. This is an official hospital  
9 record, to the best. They would be fair to you. They will say  
10 you know what. They are different indications in the records,  
11 but, yet, no, they come to you and tell you, you know what, she  
12 didn't lose consciousness. And they think that everybody  
13 doesn't see this, and it wasn't made by me. Imagine team  
14 Platta did the work. It was just hospital, a nurse, or doctor  
15 who put this note. And, surprisingly, it wasn't included as  
16 part of defendants' ambulance call report. You have to  
17 remember one thing. What do you feel when accident happens?  
18 Do you really feel conscious? Is your brain exactly the same  
19 way after being hit by a 40,000 pound truck. I submit to you,  
20 I don't think so.

21           Going back to the pain issue, defendants told you  
22 throughout the trial, pain was mild, which means basically  
23 close to none. Here again, I showed it to Dr. Crane -- I'm  
24 sorry -- to one of the defense witnesses, and he couldn't  
25 explain that. Again, the same thing. He had chosen one of the

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1 records to say you know what, she had mild pain because it's  
2 here. I know it's nowhere else in the record that she has  
3 mild. Everywhere else it says she has a very high pain, 9 out  
4 10. I see this one notation, so I am going to tell the jury  
5 and I am going to fool them. Don't let them, and especially  
6 defendant, fool you.

7 My client came back to Cabrini one more time and that  
8 was on May 17. You can see the date clearly here. This is the  
9 date of admission. And May 17 happened to be also her surgery  
10 date, the day when she was operated on by Dr. Ramesh Babu, and  
11 you've heard this testimony. He had no doubt that she needs  
12 surgery. He told you that he is not a treating doctor. He's a  
13 doctor of last resort. What does it mean? That just means  
14 that he doesn't treat patients. He operates on them. And for  
15 defendants to actually tell you that he saw her once before the  
16 surgery, speechless. This doctor was here. And he told you  
17 that what you see on the screen is the exact depiction of his  
18 surgery. This is what he saw.

19 When he went inside Ms. Frometa, he actually drilled,  
20 he removed portion of the vertebra, he put instruments inside.  
21 He extracted portions the disk, the one that was actually  
22 injuring the nerve root. This is why she didn't feel her right  
23 leg. This was actually consistent with the radiculopathy that  
24 she had in her lower back which basically means she has  
25 tingling sensation, pain, and weakness and numbness. She

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1 didn't feel her leg. You heard her testimony. She couldn't  
2 walk, pretty much. She had moments for 10, 15, 20, 40 minutes,  
3 just not have her leg. I don't know if any of us had this  
4 feeling before. It's very difficult to understand the second  
5 person without knowing what it is exactly.

6 In order for her to actually go injure herself and  
7 have portions of her own spine removed, that's not likely to be  
8 coincidental to what Mr. Diaz did, 40,000 pound truck, no prior  
9 lawsuits. No doubt that this surgery was necessary. Even  
10 Dr. April, the alleged doctor who was supposed to talk to you  
11 about life care plan, who had absolutely no experience in this  
12 area. He wasn't a life care planner. He had no idea what he  
13 was talking about. He even couldn't even tell you that after  
14 looking at both surgeries and not being able to see the client  
15 once, because he didn't feel it's important, that these  
16 injuries are not related. He couldn't say that. He said, I  
17 cannot answer these questions.

18 And you remember from yesterday. It was as  
19 embarrassing to defendants as truthful. At this last question  
20 he actually was honest, he finally admitted, you know what, bad  
21 things happen. I didn't see her, I didn't operate her, I  
22 didn't review her MRI film, and I saw -- you saw them running  
23 with the records back and forth just to make sure that he can  
24 testify about something. And he was trying to do his best. He  
25 was hired for this one-time testimony. He never treated the



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1 patient. He never saw her. He doesn't feel for her. He  
2 doesn't even know how much pain she has to go through in order  
3 to go for such surgery. He doesn't do surgery. He is a  
4 neurologist.

5 This was who was presented to you in order to defend  
6 the case, the case of the real accident, the February 14  
7 accident. Now, the only way to defend it is to make yourself  
8 doubt. And this is what Mr. Miller was actually doing. He was  
9 screaming, having very loud voice when he was talking to you a  
10 few minutes ago. It's not about loudness. It's about the  
11 truth. It's about reading the evidence. And even giving  
12 someone in this case, my client, Ms. Frometa, a fair share, a  
13 fair life for the future. She didn't ask for it. She just  
14 happened to be in the wrong place at the wrong time, not her  
15 fault. And the judge made a decision. This defendant was  
16 negligent at 100 percent.

17 Now, going forward, this is the next thing that  
18 happened to Ms. Frometa. The reason why I'm showing you right  
19 after the surgery that Dr. Babu did is that she required that  
20 even though she had the surgery, she had the surgery in May,  
21 you can look at the dates for the steroid injections. They all  
22 happen in October, couple of months after.

23 What does it mean? That means that even though he  
24 removed a portion of the disk, even though he drilled in her  
25 spine, he wasn't able to cure her completely. The pain was

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1 still there. Now she feels her leg. She does. Thank God.  
2 But she also feels pain. And pain is the worst thing to  
3 explain because we are not able to feel for her. The pain that  
4 she has to go through, because of this accident, we won't be  
5 able to be fair to her. We actually have to feel what the pain  
6 means and it's very difficult to describe. It's very easy for  
7 defendants to say it was nothing, it was not related.

8 But actually to put yourself into the position of the  
9 person who is injured, who had the drill in her spine, who had  
10 an instrument that removed portions of her spine, that's a  
11 different story. I'm sure you would have doubts about going  
12 through the surgery, the same as she had. She didn't want  
13 steroid injections in the beginning because she says, I don't  
14 want needles. That's why Dr. Kaisman didn't work for her. She  
15 said I'm not going for that, I don't want that. I'm scared.  
16 She actually run away from his office, as she told me.

17 The reason why Dr. Kaisman didn't testify, because  
18 that's one of the points that Mr. Miller was nice enough to  
19 point to you, that's called cumulative evidence. Dr. Kaisman  
20 is the same specialty as Dr. Davy. They wouldn't be able to  
21 testify together on the same trial. And who was treating her  
22 more, Dr. Davy or Dr. Kaisman? Dr. Kaisman, she escaped from  
23 his office. I don't want needle. I don't want anything. Dr.  
24 Davy got her after the surgery, when she actually couldn't take  
25 it anymore, and she said, you know what, at this point it's

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Summation - Mr. Platta

1     October, it's been many months for my accident. Do whatever  
2     you can to help me. And he did. He injected her with steroids  
3     and they work only temporarily, but they brought her some help.  
4     She will need that in the future as well.

5             After that, Dr. Davy did what he felt was the  
6     appropriate thing to do, which is basically operate on her, and  
7     he used the striker device, the famous striker device that none  
8     of the defense doctors would now is appropriate. Why? What  
9     else can they say? It's an FDA-approved device, FDA-approved  
10    procedure. What else possibly can they say besides saying, you  
11    know what, my colleague wouldn't agree. Yes, your colleague  
12    wouldn't agree because he's doing arthroscopic surgeries to  
13    your foot, not to your spine. How can he possibly have a  
14    different opinion?

15            Let's look at this procedure. The reason for that was  
16    the herniation in her spine right here. You saw the MRI films,  
17    you saw the depiction of the herniation. The herniation was  
18    there and it was painful. It was pressing on nerves and it was  
19    creating a situation where my client had the same feeling in  
20    her leg as in her arms. She couldn't grab things. She  
21    couldn't be strong enough to actually help herself even around  
22    the house. I know it sounds sometimes incredible, but this one  
23    person has to go through that for the rest of her life. It's  
24    not just today.

25            By the way, this procedure is also important for

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Summation - Mr. Platta

1 defendants for one reason. If you look at the date of this  
2 procedure, which is right here, 12/13 of '07, it's definitely  
3 before Christmas. And for defense counsel to come in front of  
4 you and tell you with a straight face that there was some kind  
5 of team, it just doesn't work. The surgery was done before I  
6 even met Dr. Davy.

7 And I submit to you, whatever doctors did in this  
8 case, they didn't do that because of me, because I'm just a  
9 lawyer. She is the patient. The same as this is her day of  
10 trial, the same as with her treatment. I wasn't there on the  
11 operation table, I wasn't there when she was injected with  
12 steroid injections. I wasn't even there when she got the  
13 neurostimulator implant. You know what, I wouldn't want to be  
14 there because it's so painful. If you imagine, this is the  
15 example of the implant neurostimulator. It was supposed to  
16 help her. At that time Dr. Kincaid, the life care planner, was  
17 actually preparing his report. We all wished her that it does  
18 work because the only thing that is left afterwards is the  
19 pump, the pump that Dr. Davy referred to as costing around  
20 50,000 bucks. And the refill of the medication for this pump,  
21 for the future, is 50,000 a year. Unfortunately, Ms. Frometa  
22 doesn't have money right now to do that because no one pays  
23 anymore her medical bills. They were paid. There was over  
24 50,000 spent on her medical bills. There is no more available  
25 from her own carrier. She can't ask for more because there is

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Summation - Mr. Platta

1 nothing left.

2           It's up to you right now to decide if she can have  
3 treatment. If so, how significant treatment she had so far. I  
4 will ask you to allow her to continue that in the hope that she  
5 does feel better one day. She is not going to be like us. She  
6 is not going to feel the same way anymore. And I think what  
7 she went through shows it, that this kind of pain and suffering  
8 is unique. We don't have many cases like that where a person  
9 actually gets struck with a very heavy truck and then has to  
10 undergo all this treatment. I don't know if you know any of  
11 your friends would actually have that massive medical treatment  
12 to help a single woman live her life.

13           It's really your day, it's really our day, and for me  
14 as an attorney, to present you the case. For you as jurors,  
15 it's actually to make the decision. Whatever your decision is  
16 going to be, I will ask you to make this decision in a way that  
17 you will feel comfortable after you come back to your home, to  
18 your life, because you would know that you decided the life of  
19 a person who is injured and that your decision is going to  
20 stick to her for the rest of her life. It's not that she can  
21 come back here again. She won't be able to.

22           Now, we know what the procedures she went through.  
23 That was described by doctors, by exhibits, by presentation.  
24 You probably know about medicine right now more than myself.  
25 But what I want to talk about is, we have to know how can we

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Summation - Mr. Platta

1 help her, and we can help her in a few ways. We can help her  
2 by allowing her treatment in the future. That means costs.  
3 That means that we have to make sure that she is secure and  
4 that means, what Dr. Kincaid testified about, he said her life  
5 expectancy is 42 years. It's national standard. In order for  
6 her to reach that age she has to somehow support herself.  
7 Right now she has family members. They are helping her. She  
8 has her mother, who is an older lady, and she has a disabled  
9 sister. She can't count on any their help. She only has a  
10 aunt to help her and she does help her right now. For how  
11 long, we don't know. Forever? Probably not. We don't know.

12 She doesn't have a source of income anymore, even  
13 though she was trying to work after the accident. Before she  
14 brought a lawsuit, you've heard what the defense counsel told  
15 you, she brought a lawsuit in May. She was trying to work up  
16 until that time. She didn't. It was impossible for her to  
17 continue. That's why she is here today.

18 Now I will ask you for one thing. We have to somehow  
19 put it back together. We have to make sure that the person who  
20 is injured by negligence of another person is going to be  
21 responsible for this, that this client, that Ms. Frometa can  
22 actually go forward with her life. You heard the numbers from  
23 Dr. Kincaid. I admit to you, he was hired by me to put  
24 together numbers from the doctors.

25 The defense counsel used the words hired gun. I am

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Summation - Mr. Platta

1 not going to comment on that. I think that his term actually  
2 applied better to his doctors than to Dr. Kincaid, who was  
3 really hired to put numbers together. He did. He came up with  
4 2.5 million. It's a very large number. But if you think of  
5 it, it's \$160 per day for her medical treatment until the rest  
6 of her life. It's \$160 per day.

7 She doesn't have any medical coverage that she can  
8 use. She doesn't have pretty much anything. She has this one  
9 day of court today, nothing else. \$160 a day comes to a very  
10 large number here. But if you think that she has to pay 50,000  
11 here or there. In fact, for example, the pump that Dr. Davy  
12 was talking about is not even included in the life care plan.  
13 What does it mean? The pump itself is 50,000. Refill the  
14 medicine is 50,000 a year. That in itself is 2 million bucks  
15 and I am not even mentioning it. I'm just talking about what  
16 we had presented to you through Dr. Kincaid, 2.5 million, 160  
17 bucks a day for medical coverage.

18 I'll ask you one more thing. Medical coverage is  
19 important. We all need that, especially when we get injured.  
20 That is when we feel that we necessarily need to go to a doctor  
21 and it's nice to have something that pays for us. She doesn't  
22 have it. She doesn't have anyone to pay for her. It's either  
23 her or she doesn't get treatment. After what she went through,  
24 if she doesn't get treatment, I will leave it up to you to  
25 think what actually happens to the person who had spinal

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Summation - Mr. Platta

1 injuries.

2 Now, that's medical side of her injuries. You can  
3 also compensate her for pain and suffering, and you know she  
4 went through a lot. I don't have to repeat myself again. You  
5 know what she went through. I will ask you to consider giving  
6 her additional \$70 per day for her past pain and suffering and  
7 for the future. That would come up to 43 years all together  
8 and that would come up to \$1 million. It's 60 or \$70 per day  
9 for the rest of her life from the past to the future. I will  
10 leave it up to you if you agree with me or not.

11 Valuing someone's pain is very difficult. Without  
12 feeling the pain ourselves, we are not really usually  
13 comfortable saying, one minute of pain is one dollar. It's not  
14 like that. Sometimes pain, when you have to go for surgery,  
15 when they have to drill in your spine, when they have to put a  
16 needle in your throat, and they have to inject you many, many  
17 times. This is not the same kind of pain as headache, I  
18 submit. When you have a migraine, you just take pain pill.  
19 She cannot take a pain pill. It won't work.

20 Again, numbers are just numbers. I will leave it up  
21 to you. I know that you're very educated and that you can come  
22 up with your own numbers. My suggestion to you is to  
23 compensate her \$1 million for her past and future pain and  
24 suffering, if you find it applicable, and also 2.5 million for  
25 her medical care. That's crucial. She cannot live without it.



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Summation - Mr. Platta

1 I will leave it up to you if you will decide to add  
2 anything to that, for example, the cost of the pump. I know  
3 that you've heard the testimony, and I know that you were  
4 paying attention throughout the trial. And this is the day  
5 when you will have to make a decision. And please use all the  
6 exhibits, use all that you've heard during the course of this  
7 trial. Don't depend on the words of attorneys. Depend on the  
8 words of the doctors.

9 Let me just go for one more second to the issue of  
10 doctors. You saw many doctors testifying on her behalf who are  
11 treating doctors. There was one defense doctor who examined  
12 her, Dr. Crane. Surprisingly, he said she is fine. But in his  
13 report, that you didn't see, he states that he cannot rule it  
14 out, he cannot actually state that it's absolutely not related  
15 to the accident. It's most likely. It's not the same as not  
16 related to the accident. He wasn't sure himself. And you  
17 heard during his testimony, he wasn't certain. He couldn't  
18 tell you exactly that it's not related injury.

19 Second doctor, Dr. Rothman, the radiologist, I  
20 actually agreed with him about his findings because he told  
21 you, he agreed with the doctors, with Dr. Babu and with other  
22 treating physicians that she had herniations. He said that.  
23 He couldn't tell you precisely what happened to her, and he  
24 couldn't tell you whether this is related because he never  
25 examined her. He never treated her. He never operated on her.

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Summation - Mr. Platta

1 When he saw the MRI films -- not the MRI -- the surgical films,  
2 he told you that he cannot see it on the film when the surgeon  
3 can see the spine. These findings are only as good as  
4 radiologist findings. He's a great doctor. I submit to you  
5 he's fine. He just couldn't tell you what a neurosurgeon, once  
6 he cuts open your body, sees, and he was honest about that.

7 Who else did we have? We had Dr. April, last witness  
8 yesterday. I think we all had interesting time with this  
9 doctor. He was actually the one honest at the end who said, I  
10 cannot answer the question whether this is related or not. I  
11 don't know. But he only said that after pointing out to him,  
12 Doctor, you never saw this patient. Doctor, did you operate on  
13 her? Did you read the MRI films? No. Nothing. I just  
14 reviewed the records.

15 He reviewed the records only one way. Why? Think  
16 about what he said about pain. It's mild. Oh, she didn't lose  
17 consciousness. Well, look at the records. The records  
18 actually indicate something else. And he wouldn't tell you,  
19 you know what, well, the records actually speak for both. I  
20 cannot tell you exactly what happened because I wasn't there.  
21 He would tell you, I know what happened, I'm a doctor. I  
22 didn't see her, but I know what happened. I'm a hired gun to  
23 testify, but I will tell you honestly, this injury is not  
24 related to this case. You heard the judge asking some  
25 questions about that, and I think you all draw conclusions,

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Summation - Mr. Platta

1 based on your Honor's questions, what the testimony was. You  
2 will have to decide the case based on the credibility as well,  
3 not only my client's credibility, but also on the credibility  
4 of the witnesses from the other side, who they showed you to  
5 tell you that I'm wrong and that my client wasn't injured.

6 Was one of them credible? Was one of them telling  
7 you, you know what, I can certainly tell you that what she is  
8 suffering from is not starting from February 14. I submit to  
9 you there is none. I asked him, did you have records? Yeah, I  
10 send them records. Did you ask to see the patient? No, we  
11 usually don't do that. How can you possibly come here with a  
12 straight face and tell us, you know what, she is not injured,  
13 it's not because of this accident, and it is like that because  
14 I tell you so, because all the medical records are saying  
15 something else, but I tell you, because I was paid 5, 6,000,  
16 whatever it was, to tell you that. And it was sad to look at  
17 those guys yesterday because they had to defend, they had to  
18 say what they said because they were paid for their time.

19 Now, I want to point out to your attention a history,  
20 and you heard testimony that a history of a patient is very  
21 important, and I think everybody agrees with that. Now we have  
22 to divide between patient's history regarding her accident and  
23 regarding her injuries. And Ms. Frometa never denied to you,  
24 she never said, I didn't have accidents. She said to you, I  
25 had fenders benders. I never sued someone, but I had prior

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Summation - Mr. Platta

1 fender benders. We live in New York. We could have an  
2 accident today. We could be in her shoes today or we could  
3 have a fender bender and we will be like, you know what, there  
4 is nothing there, not a big deal.

5 Now, defense counsel was telling you, oh, my God, she  
6 had all these accidents. No prior history, no prior treatment  
7 for anything. Not even MRI. And usually when you have pain in  
8 your back, like in this case, you go for MRI, right? And do  
9 you think for a second, for one split second, that this law  
10 firm would not do their research, that they would actually not  
11 spend money and time to find MRI film? I submit to you it's  
12 very easy. You get this social security number and you're on  
13 the record and you find out, very easy. Did they show you one  
14 piece of evidence? I will leave this answer to you.

15 I will just repeat one more thing. The artwork that I  
16 presented to you is the actual evidence. You can use it, you  
17 can look at that, and it's the evidence. Basically, this is  
18 what happened, this is depiction of her injuries, depiction of  
19 her MRIs, and you can treat this the same way as medical  
20 records. There was no difference. The judge admitted this  
21 into evidence, you can look at that and compare and do whatever  
22 you would like with this.

23 Now, to respond to defendants' allegations of not  
24 bringing ambulance people in and police officer here. If I  
25 could, I would. But we would stay here for a couple of weeks

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Summation - Mr. Platta

1 if we call every single person that treated my client, every  
2 physical therapist, every chiropractor, police officer, every  
3 single person that treated her. And your Honor wouldn't allow  
4 most of this testimony because that would be repetitive. It  
5 would be the same thing spoken over and over again.

6 You saw during the testimony of Ms. Frometa's doctors  
7 that some of them were talking about the same things. They  
8 were neurologists, neurosurgeons, and pain management. These  
9 were the three key doctors who were treating her. That's what  
10 I wanted you to actually see through the doctors who treated  
11 her the most. I didn't bother to call physical therapist,  
12 because he didn't go inside the spine. She wouldn't be able to  
13 tell you that there was this bulging disk or herniation that I  
14 pulled out.

15 Now, you've heard also from defense counsel that 95  
16 percent of the herniations are healing themselves. And Dr.  
17 Krishna actually testified about that. And he testified about  
18 that not in court here during this session, but he testified  
19 about that before, and I will point it to your attention.

20 MR. COFFEY: Objection.

21 THE COURT: Mr. Platta, you are already twice the time  
22 you promised --

23 MR. PLATTA: I'm finishing, your Honor.

24 THE COURT: I'll sustain the objection. Take it off  
25 the screen.

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Summation - Mr. Platta

1           MR. PLATTA: I submit to you that Dr. Krishna actually  
2 explained that situation easily. When someone is very active  
3 and he or she does sports and has one herniation that's very  
4 unlikely that's degenerative herniation, you can have the  
5 degenerative changes in your spine, doesn't mean that it  
6 creates Herniation right away. 95 percent of herniations heal  
7 if they are just on one level. Here, you don't have one level  
8 of herniations. The disks were injured on a couple of levels,  
9 especially on the neck. The lower back was seriously injured.  
10 That's why she required an open surgery, not just the surgery  
11 that Dr. Davy did, but an open surgery with drills, with  
12 instruments, and with scalpel.

13           One of my final remarks, please look at the records.  
14 The testimony of Dr. Kincaid, as to my recollection, and his  
15 report that I have in front of me was that the cost of it is  
16 14,000 per year -- 14,000 in total per her lifetime. It was  
17 approximately 1400 per year. So it's not exactly 18,000. I  
18 know that someone mentioned this during the trial, but let's  
19 not go crazy, seriously. You have all the records. Please  
20 just review them. Take your time.

21           Again, I would like to thank you for your time. You  
22 have been very patient and you have been very concerned about  
23 this case. And it is your time now. It's your time to  
24 deliberate, it's your time to take and make decisions. Please  
25 make sure that when you make your decisions you can actually

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Summation - Mr. Platta

1     come back home and say, I did something right. And whatever  
2     that means, be fair to my client, not to me.

3             Thank you very much. Thank you, your Honor. Thank  
4     you, counsel.

5             THE COURT: Very well. You can eat for an hour and  
6     then we will see you at 2:00, everybody.

7             (Recess)

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1 AFTERNOON SESSION

2 2:10 p.m.

3 (Jury present)

4 THE COURT: Ladies and gentlemen, this is the last  
5 phase of, I guess, any trial, certainly civil trials, and I  
6 guess criminal as well. And I am going to read it to you  
7 because while you have heard many of these charges given to you  
8 extemporaneously, not that they have not been done perfectly, I  
9 feel more confident reading it to you and knowing that it's the  
10 law, or at least what the lawyers and I have concluded is the  
11 law.

12 Now that the evidence in this case has been presented  
13 and the attorneys for the parties have concluded their closing  
14 arguments, it is my responsibility to -- if you don't hear me  
15 you let me know. It's rarely my problem -- pay close attention  
16 and I will be as clear as possible. My instructions are in  
17 three parts.

18 First: I will give you instructions regarding the  
19 general rules that define and govern the duties of a jury in a  
20 civil case;

21 Second: I will instruct you as to the legal elements  
22 of the causes of action alleged by the plaintiff and the  
23 defendant in this action.

24 Finally, I will give you instructions regarding the  
25 general rules governing your deliberations as jurors.



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Charge

1           It is your responsibility to find the facts from all  
2     the evidence in this case. You are the sole judges of the  
3     facts, not counsel and not I. I want to impress upon you again  
4     the importance of that role. It is for you and you alone to  
5     pass upon the weight of the evidence, to resolve such conflicts  
6     as may have appeared in the evidence, and to draw such  
7     inferences as you deem to be reasonable and warranted from the  
8     evidence or lack of evidence.

9           With respect to any questions concerning the facts, it  
10    is your recollection of that evidence and yours alone that  
11    governs.

12          You are to conduct your deliberations as a juror in an  
13    atmosphere of complete fairness and impartiality, without bias  
14    for or against the plaintiff or the defendant. This case  
15    should be considered and decided by you as an action between  
16    parties of equal standing in the community. No party is  
17    entitled to sympathy or favor.

18          It would be improper for you to consider any personal  
19    feelings you may have about one of the parties' race, religion,  
20    national origin, sex, or age. It would be equally improper for  
21    you to allow any feelings you might have about the nature of  
22    the claim influence you in any way.

23          The parties in this case are entitled to a trial free  
24    from prejudice. You must reach your verdict through a fair and  
25    impartial consideration of the evidence.

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Charge

1           You have now heard all of the evidence in the case.  
2   Keep in mind that while it is your duty to accept the law from  
3   me, you must apply the facts in the way you determine them.  
4   Again, you are the exclusive judges of the facts.

5           You should not single out any instruction as alone  
6   stating the law by which the case should be judged, but you  
7   should consider my instructions as a whole when you retire to  
8   deliberate.

9           Finally, on this issue, you should not, any of you, be  
10   concerned about the wisdom of any rule that I state.  
11   Regardless of any opinion that you may have as to what the law  
12   may be, or ought to be, it would violate your sworn or affirmed  
13   duty to base a verdict upon any other view of the law than that  
14   which I give you. Neither you nor I have the right to follow  
15   our predilections about what the law should be. We must both  
16   follow the law as it is and as I charge it to you.

17           Remember, you are the sole and exclusive judges of the  
18   facts. You pass upon the weight of the evidence, you determine  
19   the credibility of the witnesses, you resolve conflicts as  
20   there may be in the testimony, and you draw whatever reasonable  
21   inferences you decide to draw from the facts as you have  
22   determined them.

23           I shall later discuss with you how to think about the  
24   credibility, or believability, of the witnesses.

25           In determining the facts, you must rely upon your own

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Charge

1 recollection of the evidence. Anything that counsel may have  
2 said while questioning witnesses or during argument is not to  
3 be substituted for your own recollection and evaluation of the  
4 evidence. With respect to a fact matter, nothing I may have  
5 said during the trial, or may say during these instructions,  
6 should be taken in substitution for your own independent  
7 recollection.

8           Because you are the sole and exclusive judges of the  
9 facts, I do not mean to indicate any opinion as to the facts or  
10 what your verdict should be. Indeed, I have no power to tell  
11 you what your verdict should be. If I allude to a fact and  
12 should your recollection differ from mine, once again, it is  
13 your recollection that governs.

14           During the trial I have been called upon to make  
15 rulings on various questions. Those rulings are not evidence  
16 and need not be considered by you. Procedural matters are  
17 matters of law and although you may have been curious about  
18 them, you should not consider them.

19           The rulings I have made during the trial are not any  
20 indication of my views of what your decision should be.

21           I also ask you to draw no inferences from the fact  
22 that upon occasion I may have asked questions of certain  
23 witnesses. Such questions were only intended for clarification  
24 or to explain matters and certainly were not intended to  
25 suggest any opinion on my part as to the verdict you should

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Charge

1 render or whether any of the witnesses may have been more  
2 credible than any other of the witnesses.

3 Your job is to consider only the evidence, and find  
4 facts from what you consider to be the believable and credible  
5 evidence, and apply the law as I give it to you. Your verdict  
6 will be determined by the conclusions you reach, no matter whom  
7 the verdict helps or hurts. Sympathy and speculation should  
8 play no part in your decision.

9 The burden of proof for the plaintiff's claim is on  
10 the plaintiff to prove each essential element of his claim by a  
11 preponderance -- I guess it's her claim -- by a preponderance  
12 of the evidence. You are most likely familiar with the  
13 standard of beyond a reasonable doubt, which is the burden of  
14 proof in a criminal case. That standard does not apply to a  
15 civil case such as this, and you should therefore put it far  
16 from your mind.

17 To establish a preponderance of the evidence means to  
18 prove that something is more likely so than not so. A  
19 preponderance of the evidence means the greater weight of the  
20 evidence. It refers to the quality and persuasiveness of the  
21 credible evidence on an issue where it is evenly divided  
22 between the parties; that is, equally probably that one side is  
23 right as it is that the other side is right, then you must  
24 decide that issue against the party having the burden of proof.  
25 That is because the party who has to shoulder the burden of

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Charge

1 proof must prove more than simple quality of evidence. The  
2 party must prove its claims by a preponderance of the evidence.  
3 On the other hand, the party that has to shoulder the burden of  
4 proof need prove no more than a preponderance. So long as you  
5 find that the scales tip, however slightly, in favor of the  
6 plaintiff, that what she claims is more likely true than not  
7 true, then the plaintiff's claim will have been proved by a  
8 preponderance of the evidence.

9 In determining whether any fact has been proved by a  
10 preponderance of the evidence in the case, you may consider the  
11 testimony of all the witnesses, regardless of who may have  
12 called them, and all exhibits received into evidence,  
13 regardless of who may have introduced them.

14 The evidence upon which you are to decide what the  
15 facts are in this case comes from the sworn testimony of  
16 witnesses, including deposition testimony, both on direct and  
17 cross-examination, and regardless of who called the witness,  
18 and from exhibits that the Court received in evidence, and from  
19 stipulations. A stipulation of a fact is an agreement among  
20 the parties that a certain fact is true. You must regard such  
21 agreed facts as true.

22 There were a number of stipulations. They never were  
23 read to you. In fact, both parties knew what they were. I  
24 guess they went along as if they didn't have to read them  
25 independently to you, and you really don't have to think of any

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1 stipulations as a separate part of the evidence because you  
2 didn't see or hear any.

3           There is also a problem with respect to the exhibits.  
4 While they are all marked, or at least were originally, they  
5 sort of came in helter skelter. So if you want an exhibit, try  
6 and identify what that exhibit is, because if you were to  
7 remember, which is not that likely, P-18, you really are not  
8 sure whether P-18 is equally available to you. So whatever you  
9 want we will provide to you, but if you give us information  
10 about the exhibit you're looking for, I suppose that would make  
11 it easier, and it might tell me the ones I kept out that you  
12 can't see.

13           What is not evidence. Certain things are not evidence  
14 and are to be disregarded in deciding what the facts are. They  
15 include arguments or statements by lawyers, including openings  
16 and summations, objections to questions, testimony that has  
17 been excluded, stricken, or that you have been instructed to  
18 disregard, and anything you may have seen or heard outside the  
19 courtroom is not evidence.

20           In making your determination, you may consider  
21 evidence which is either direct or circumstantial.

22           Direct evidence is that which a witness testifies that  
23 the witness has perceived. Direct evidence may also be in the  
24 form of an exhibit admitted into evidence.

25           Circumstantial evidence is proof of a claim of facts

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1 and circumstances from which other inferences may be drawn.  
2 You are allowed to make reasonable inferences from particular  
3 facts that are established by direct evidence, and that is  
4 circumstantial evidence.

5 The law does not distinguish between direct and  
6 circumstantial evidence. You may give equal weight to both.  
7 The question in the case is whether, based upon all the  
8 evidence, both direct and circumstantial, the party with the  
9 burden has proved its case by a preponderance of the evidence.

10 I gave you an example at the preliminary charge about  
11 what circumstantial evidence is. I don't really think I am  
12 going to go through my subway story again.

13 As you can see, the matter of drawing inferences from  
14 facts in evidence is not a matter of guesswork or speculation.  
15 An inference is a logical, factual conclusion that you might  
16 reasonably draw from other facts that have been proved. You  
17 are permitted to draw inferences, but are not required to do  
18 so, either from direct or circumstantial evidence. In drawing  
19 inferences you should exercise your common sense.

20 Many material facts, such as state of mind, are rarely  
21 susceptible of proof by direct evidence. Usually, such facts  
22 are established by circumstantial evidence. Circumstantial  
23 evidence is of no less value than direct evidence for in either  
24 case you must be convinced that the party with the burden of  
25 proof has proved its case by a preponderance of the evidence.

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1           There are times when different inferences may be drawn  
2   from facts, whether they are proved by direct or circumstantial  
3   evidence. The plaintiff may ask you to draw one set of  
4   inferences. The defendant may ask you to draw another. It is  
5   for you, and for you alone, to decide what inferences you will  
6   draw.

7           You had an opportunity to observe all of the  
8   witnesses. It is now your job to decide how believable each  
9   witness was in his or her testimony. You are the sole judges  
10   of the credibility of each witness, and of the importance of  
11   his or her testimony.

12           It must be clear to you by now that you are being  
13   called upon to resolve various factual issues, in the face of  
14   the different pictures painted by the plaintiff and the  
15   defendant which cannot be reconciled without your help. You  
16   will now have to decide where the truth lies, and a vital part  
17   of your decision will involve making judgments about the  
18   testimony of the witnesses. In making those judgments, you  
19   should carefully scrutinize all of the testimony of each  
20   witness, the circumstances under which each witness testified,  
21   and any other matters in evidence which may help you to decide  
22   which witnesses were telling the you the truth, and which ones  
23   were not, and the importance of each witness' testimony.

24           It is your determination as to a witness' credibility  
25   that counts. Nonetheless, the law has provided some



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1 guidelines. For instance, you should consider the witness'  
2 demeanor. Was the witness candid, frank, and forthright? Or  
3 did the witness seem as if he or she was hiding something,  
4 being evasive, or suspect in some way? How did the way the  
5 witness testified on direct examination compare with how the  
6 witness testified on cross? Was the witness consistent in his  
7 or her testimony, or did he or she contradict himself or  
8 herself? Did the witness appear to know what he or she was  
9 talking about, and did the witness strike you as someone who  
10 was trying to report his or her knowledge accurately?

11 Your decision whether or not to believe a witness may  
12 also depend on whether, or to the extent to which, the witness'  
13 testimony is corroborated or supported by other evidence in the  
14 case.

15 Even if the witness was impartial, you should consider  
16 whether the witness had an opportunity to observe the facts he  
17 or she testified about. Ask yourselves whether the witness'  
18 recollection of the facts stands up in light of all the other  
19 evidence.

20 In other words, what you must try to do in deciding  
21 credibility is to size a person up in light of his demeanor,  
22 the explanations given, and in light of all the other evidence  
23 in the case, or the lack of evidence in the case, just as you  
24 would in any important matter where you were trying to decide  
25 if a person is truthful, straightforward, and accurate. In

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1 deciding the question of credibility, remember that you should  
2 use your common sense, your good judgment, your life  
3 experience.

4           Inconsistencies or discrepancies in the testimony of a  
5 witness, or between the testimony of different witnesses, may  
6 or may not cause you to discredit such testimony. Two or more  
7 persons witnessing an accident or a transaction may see or hear  
8 it differently. In weighing the effect of a discrepancy,  
9 always consider whether it pertains to a matter of importance  
10 or an unimportant or immaterial detail, and whether the  
11 discrepancy results from innocent error or intentional  
12 falsehood.

13           If a person is shown to have knowingly testified  
14 falsely concerning any important or material matter, you have a  
15 right to distrust the testimony of such an individual  
16 concerning other matters. You may reject all of the testimony  
17 of that witness or give it such weight and credibility as you  
18 think is deserved.

19           A witness may be inaccurate, contradictory, or even  
20 untruthful in some respects and yet may be entirely credible in  
21 the essence of his or her testimony. It is for you to say  
22 whether his or her testimony in this trial is truthful in whole  
23 or in part, and to give it such weight as you believe it  
24 deserves.

25           A witness may be discredited or impeached by

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1 contradictory evidence from other witnesses, or by evidence  
2 that in a prior time the witness had said or done something, or  
3 failed to say or do something, which is inconsistent with the  
4 witness' present testimony.

5           You are not to consider evidence of a prior  
6 inconsistent statement as affirmative evidence in determining  
7 the acts complained of. Any evidence of a prior inconsistent  
8 statement was placed before you for the more limited purpose of  
9 helping you decide whether to believe the trial testimony of a  
10 witness who contradicted a prior statement. If you believe any  
11 witness has been impeached and thus discredited, it is your  
12 exclusive province to give the testimony of that witness such  
13 credibility, if any, as you may think it deserves.

14           In evaluating the credibility of the witnesses, you  
15 may take into account any evidence that the witness who  
16 testified may benefit in some way from the outcome of this  
17 case. Such an interest in the outcome may sway the witness to  
18 testify in a way that advances his or her own interests.  
19 Therefore, if you find that any witness whose testimony you are  
20 considering may have an interest in the outcome of this trial,  
21 you should bear that factor in mind when evaluating the  
22 credibility of his or her testimony.

23           This is not to suggest that every witness who has an  
24 interest in the outcome of this case will testify falsely, or  
25 conversely, that witnesses with no apparent interest in the

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1 case will always tell you the truth. It is for you to decide  
2 what extent, if at all, the witnesses' interest has affected or  
3 colored his or her testimony.

4 Keep in mind, too, that the test is not which side  
5 brings the greater number of witnesses or presents the greater  
6 quantity of evidence, but which witnesses and which evidence  
7 appeal to your minds as being the most accurate and otherwise  
8 trustworthy. In other words, it is the quality, not the  
9 quantity, of the evidence that counts.

10 You have heard from more than one expert witness. An  
11 expert witness is a witness who has special training or  
12 expertise in a given field and is permitted to express opinions  
13 based on observed or assumed facts to aid you in deciding the  
14 issues in the case.

15 The opinions stated by each expert were based on  
16 particular facts, as the expert obtained knowledge of them and  
17 testified to them before you, or as the attorneys who  
18 questioned each expert asked him to assume certain facts. Keep  
19 in mind, like any other witness, you may reject an expert's  
20 opinion if you find the facts to be different from those which  
21 form the basis of his opinion. His opinion is not gospel.

22 You may also reject an opinion, if, after careful  
23 consideration of all the evidence in the case, expert and  
24 other, you disagree with that opinion. In other words, you are  
25 not required to accept an expert's opinion to the exclusion of

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1 the facts and circumstances disclosed by other testimony. Such  
2 an opinion is subject to the same rules concerning reliability  
3 of the testimony of any other witness. It is given to assist  
4 you in reaching a proper conclusion. It is entitled to such  
5 weight as you find the expert's qualifications in the field  
6 warrant, and must be considered by you, but it is not  
7 controlling upon your judgment.

8 The law does not require any party to call as  
9 witnesses all persons who may have been present at any time or  
10 place involved in the case, or who may appear to have some  
11 knowledge of the matters in issue at the trial. Keep in mind,  
12 with respect to witnesses, they are equally available to both  
13 sides. Put another way, either side was able to call any  
14 witness it chose to call.

15 When a corporation is involved, of course, it may act  
16 only through natural persons, agents, or employees. I don't  
17 think this is applicable for us. Happily, that's the end of  
18 the boilerplate.

19 I will now instruct you on the law applicable to the  
20 claims in this case. The plaintiff in this case is Adonna  
21 Frometa; the defendants, Mr. Mario Diaz-Diaz and All American  
22 Haulers & Recycling. All American Haulers & Recycling have  
23 conceded that they are liable for the vehicle accident that  
24 took place on February 14. At the time of the accident,  
25 defendant Mario Diaz-Diaz was driving a sanitation truck in the

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1 course of his employment with defendant All American Haulers &  
2 Recycling.

3 What you must now decide are, first, whether the  
4 accident was a proximate cause of Ms. Frometa's injuries and,  
5 if so, the sum of money that will justly and fairly compensate  
6 her for all losses resulting from the injuries she sustained.

7 Ms. Frometa has the burden of proving, by a  
8 preponderance of the evidence, that her damages were  
9 proximately caused by the accident that occurred on February  
10 14, 2007. The accident is a proximate cause of an injury if it  
11 was a substantial factor in bringing about the injury, that is,  
12 if it had such an effect in producing the injury that  
13 reasonable people would regard it as a cause of the injury.  
14 There may be more than one cause of an injury, but to be  
15 substantial it cannot be slight or trivial.

16 The fact that Ms. Frometa may have a physical  
17 condition, such as some amounts of degeneration of the spine,  
18 which makes her more susceptible to injury than a person who  
19 does not have any spinal degeneration, does not relieve the  
20 defendant of liability for all injuries sustained as a result  
21 of the accident. Put another way, the defendant takes the  
22 plaintiff as they find her. The defendants are liable even  
23 though those injuries are greater than those that would have  
24 been sustained by a normal healthy person under the same  
25 circumstances.

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1           Ms. Frometa is entitled to recover for her reasonable  
2     expenditures for medicines and medical services, and for any  
3     other reasonable and necessary expense incurred as a result of  
4     the accident involved in this case. She may recover for  
5     necessary and reasonable medical and other expenses incurred to  
6     date and such expenses that she will incur in the future.  
7     Ms. Frometa may prove the amount of her future expenses with  
8     reasonable certainty and that such expenses are reasonable and  
9     necessary. They need not be proven to a mathematical  
10    certainty. You may decide the amounts of such medical and  
11    other expenses that have resulted, or will result, from the  
12    accident, so that I can enter a judgment in the proper amount.

13           In order for Ms. Frometa to recover damages for any  
14    pain and suffering that were caused by the accident, she must  
15    prove, by a preponderance of the evidence, that she has  
16    sustained a serious injury, as that term is defined by New York  
17    law. There are several types of injuries that qualify as a  
18    serious injury. Your verdict sheet will ask you to decide  
19    whether Ms. Frometa has proved that her injury qualifies for  
20    one or more of these four types of serious injury. I should  
21    mention to you, but you will see it in a moment, that the  
22    verdict sheet has got a number of questions for you to answer.  
23    It sort of defines some of what we have been talking about  
24    here. So it hopefully will be helpful to you. She does not  
25    need to prove that her injury fits into all four categories.

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1 If her injury qualifies for one of the categories of serious  
2 injury, she may recover damages for any pain and suffering that  
3 were caused by the accident.

4 The first category of serious injury that Ms. Frometa  
5 claims she has suffered is the permanent loss of the use of a  
6 body organ, member, function, or system. To find a permanent  
7 loss, you must find that the loss of the organ, member, system,  
8 or function is total. It is not sufficient for you to find  
9 that the organ, member, system or function operates in some  
10 limited way.

11 The second category of serious injury that Ms. Frometa  
12 claims she has suffered is the significant limitation of use of  
13 a body function or system. A limitation of use of a body  
14 function or system means that the function or system does not  
15 operate at all or operates only in some limited way. It is not  
16 necessary for you to find that there has been a total loss of  
17 the body function or system or that the limitation of use is  
18 permanent. However, the limitation of use must be significant,  
19 meaning that the loss is important or meaningful. A minor,  
20 mild, or slight limitation of use is not significant.

21 The third category of serious injury that Ms. Frometa  
22 claims she has suffered is the permanent consequential  
23 limitation of use of a body organ or member. A limitation of  
24 use of a body organ or member means that the body organ or  
25 member does not operate at all or operates only in some limited



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1 way. It is not necessary for you to find that there has been a  
2 total loss of the use of the body organ or member. The  
3 limitation of use must be consequential, which means that it is  
4 significant, important, or of consequence. A minor, mild, or  
5 slight limitation of use is not significant, important, or of  
6 consequence.

7 The fourth category of serious injury that Ms. Frometa  
8 claims she has suffered is a medically determined injury or  
9 impairment of a nonpermanent nature that prevented her from  
10 performing substantially all of the material acts that  
11 constituted her usual and customary daily activity for not less  
12 than 90 days during the 180 days immediately following the  
13 accident on February 14, 2007. A medically determined injury  
14 is one that is supported by testimony by a doctor.

15 Remember, you need only answer one of these four  
16 questions yes on your verdict sheet for Ms. Frometa to recover  
17 damages for any pain and suffering that were caused by the  
18 accident.

19 They are all spelled out on your verdict sheet, so you  
20 don't have to remember them, those four.

21 If you find that Ms. Frometa has sustained a serious  
22 injury in at least one of the four categories that I have  
23 described, then you may award her a sum of money that will  
24 justly and fairly compensate her for any conscious pain and  
25 suffering that was caused by the accident of February 14, 2007.

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1 Conscious pain and suffering means pain and suffering for which  
2 there was some level of awareness by Ms. Frometa.

3 In determining the amount, if any, to be awarded to  
4 Ms. Frometa for pain and suffering, you may take into  
5 consideration the effect that her injuries have had on her  
6 ability to enjoy life. Loss of enjoyment of life involves the  
7 loss of the ability to perform daily tasks, to participate in  
8 the activities which were a part of the person's life before  
9 the injury, and to experience the pleasures of life.

10 Ms. Frometa is also entitled to recover for any future  
11 pain and suffering that were caused by the accident. In this  
12 regard, you should take into consideration the period of time  
13 that the injuries are expected to continue. If you find that  
14 the injuries are permanent, you should take into consideration  
15 the period of time that Ms. Frometa can be expected to live.  
16 In accordance with statistical life expectancy tables,  
17 Ms. Frometa has a life expectancy of 82 years.

18 Such a table, however, provides nothing more than a  
19 statistical average. It neither guarantees that Ms. Frometa  
20 will live an additional 42 years or means that she will not  
21 live for a longer period of time. The life expectancy figure I  
22 have given you is not binding upon you, but may be considered  
23 by you together with your own experience and the evidence you  
24 have heard concerning the condition of Ms. Frometa's health,  
25 her habits, employment and activities, or lack thereof, in

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1 deciding what her present life expectancy is.

2           You may also award Ms. Frometa a sum of money that  
3 will justly and fairly compensate her for any mental suffering,  
4 emotional and psychological injury, and any physical  
5 consequences resulting from the emotional distress that was  
6 reasonably caused by the accident.

7           I should tell you that frequently that what happens is  
8 that the first portion is read and then I tell you, as I'm  
9 telling you now, that I read you the second portion on damages  
10 simply because if, in fact, you were only to look at the first  
11 portion or hear only the first part of my deliberations, you  
12 would have to come back out and listen to the charge on  
13 damages, and it seems unnatural to do that. So it's all  
14 charged at the same time.

15           That brings us to the third and final part of these  
16 instructions.

17           This case will be decided on the basis of the answers  
18 that you give to certain questions which will be -- which you  
19 will find on your verdict sheet. As you will note from reading  
20 the questions, you may not need to answer certain questions at  
21 all depending on your answer to one or more preceding  
22 questions.

23           In this court, while a jury of six can deliberate and  
24 reach a verdict, if there are more than six, which there are  
25 here, they are not considered alternates, but are full-fledged

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1 jurors. In this case, all eight jurors will deliberate. It is  
2 also the rule in this court that the jury must be unanimous.  
3 When all of you have reached an answer, the foreperson of the  
4 jury will write the answer in the space provided on the verdict  
5 sheet. When you answer the requisite questions, the foreperson  
6 will sign the verdict sheet and signal the marshal that you are  
7 ready to report your verdict to the Court. The foreperson will  
8 then be taken through the verdict sheet by my courtroom deputy.

9 Do not assume from the questions or from the wording  
10 of the questions or from my instructions about them what the  
11 answers should be or any view I might have about what the  
12 answers should be. Again, I have no power to tell you what the  
13 answers should be.

14 It is your duty as jurors to consult with one another  
15 and to deliberate with a view to reaching an agreement. Each  
16 of you must decide the case for himself or herself, but you  
17 should do so only after a consideration of the case with your  
18 fellow jurors, and you should not hesitate to change an opinion  
19 when convinced that it is erroneous. You are not bound to  
20 surrender your honest convictions concerning the effect or  
21 weight of the evidence for the mere purpose of returning a  
22 verdict based on the opinion of other jurors. Discuss and  
23 weigh your respective opinions dispassionately, without regard  
24 to prejudice or favor for either party, and adopt that  
25 conclusion which in your good conscience appears to be in

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1 accordance with the truth.

2           Once you get into the jury room, the foreperson, juror  
3 no. 1, unless you agree on another, will be responsible for  
4 signing all communications to the Court and for handing them to  
5 the marshal during your deliberations.

6           If during your deliberations you want to see any of  
7 the exhibits, you may request that they be brought into the  
8 jury room. If you want any of the testimony read, you must  
9 also request that. Please remember that it is not always easy  
10 to locate what you might want, so be as specific as you  
11 possibly can. In requesting portions of the testimony, if you  
12 find that necessary, let me know the witness, the subject  
13 matter, and, if possible and appropriate, direct or  
14 cross-examination, whether it is direct or cross-examination.

15           In addition, you may request to see any portion or all  
16 of my instructions on the law.

17           Your requests for exhibits or testimony, or for my  
18 charge; in fact, any communication with the Court, should be  
19 made to me in writing, signed by your foreperson, and given to  
20 one of the marshals. In any event, do not tell me or anyone  
21 else how the jury stands on any issue until a unanimous verdict  
22 has been reached.

23           Members of the jury, I am now going to ask the lawyers  
24 to come to the side bar. If you can just remain seated for  
25 another moment, we will see if there are any additions or

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1 corrections, and to not discuss the case while you're sitting  
2 in the jury box.

3 (At the side bar)

4 THE COURT: Anything else from the plaintiff?

5 MR. PLATTA: No, your Honor.

6 MR. COFFEY: No objections.

7 THE COURT: Very good.

8 (In open court)

9 THE COURT: There are no additions or corrections.

10 Take a verdict sheet and I will ask the marshal to swear you  
11 and the case will be yours.

12 (Marshal sworn)

13 THE COURT: Here is a verdict sheet, unless you have  
14 one. It's yours.

15 (At 2:45 p.m., the jury retired to deliberate)

16 THE COURT: I will be available and, if I were you, I  
17 would hang around for a little while, at least, and we will see  
18 what develops.

19 MR. COFFEY: Your Honor, if we could, I want to put  
20 one thing on the record. At this time my client has authorized  
21 me to extend the settlement offer in the amount of \$500,000 to  
22 the plaintiff.

23 THE COURT: It is now on the record. I presume that  
24 your adversary would like to talk about it with his client, but  
25 if you are going to take the offer, Mr. Platta, you'll have to

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1 get the reporter to record it for posterity. Otherwise, we  
2 will just assume it's been rejected.

3 MR. PLATTA: Thank you, your Honor.

4 THE COURT: See you later. Me and the reporter.

5 (Recess pending verdict)

6 THE COURT: Please agree upon the exhibits that we are  
7 going to let in. We don't let in the stuff you never touch or  
8 no one saw on the witness stand. Put together those others  
9 that were admitted. If you need a chart, because you never  
10 took down my rulings, my clerk will be able to find it for you  
11 right behind me somewhere on the bench.

12 (Recess pending verdict)

13 THE COURT: There are two items that I understand were  
14 not agreed to between the plaintiff and the defendant. First,  
15 let me read to Steve the jury note which says: Please provide  
16 these documents: 1. Dr. Villafuerte's record of seeing the  
17 patient physical assessment; 2. Original accident report from  
18 2/14/07; 3. ER and EMT documentation (all hospital  
19 documentation); 4. Employment documentation form for applying  
20 for a new job as a flight attendant; 5. Flight log; 6. Time  
21 log from plaintiff's dance employer, Rick's Cabaret.

22 So far as I can understand it, the police report was  
23 Plaintiff's 14 and it was talked about and it was admissible.  
24 So I am not sure what there is to do without -- other than turn  
25 it over. If you look at your chart, you'll see it's P-14 and

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1 it doesn't seem to be any problem here. At least there wasn't  
2 any problem that I heard from anybody like the defendant.

3 MR. COFFEY: We have no objection.

4 THE COURT: That takes care -- was it your objection?

5 MR. PLATTA: It was my objection, that's correct. The  
6 reason for objection is that I don't object to the document  
7 itself. I want them to see that. It's just I think that the  
8 portion of the liability description, the way the accident  
9 happened and the description of the police officer should not  
10 be there.

11 THE COURT: Start over.

12 MR. PLATTA: Judge, I'm not objecting to this  
13 document. I'm asking for a redaction of the portion that  
14 discusses liability, which is basically the diagram, as well as  
15 the description of the accident done by police officer. That's  
16 the only redaction that I would like to do and nothing else.

17 THE COURT: Why would I do that.

18 MR. PLATTA: Because liability was decided and you  
19 previously stated that you don't want them to look at documents  
20 that will discuss liability in this case.

21 THE COURT: Would what?

22 MR. PLATTA: I believe at some point there was a  
23 decision or something issue regarding liability testimony in  
24 this case, and you said that you don't want any liability  
25 issues coming up again. And this is the description of the



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1 accident as well as the diagram goes directly as to liability  
2 case, not to damages case.

3 THE COURT: I think they got that picture clearly. We  
4 told them in the charge, we told them at the beginning, we told  
5 them at the end.

6 MR. PLATTA: Thank you, your Honor.

7 THE COURT: Anyhow, the record will note your  
8 objection. That goes. And the other item is where? Midtown  
9 Medical Practice, Dr. Villafuerte. What's the problem with  
10 this?

11 MR. MILLER: Your Honor, it was defense's objection.  
12 There was no witness that testified with that document. It was  
13 only shown at closing on the screen by plaintiff's counsel.  
14 There is no witness to put it through.

15 THE COURT: My view is a little different. My view is  
16 we are not allowing anything but the plaintiff's description of  
17 the psychological problems, if any, and so whether or not we  
18 had --

19 MR. PLATTA: Your Honor, it's not psychological. It's  
20 a physical therapy place where she went for the first time  
21 after the accident. It has nothing to do with --

22 THE COURT: Why does it say psychiatric evaluations?  
23 Maybe it says physiatriac?

24 MR. PLATTA: That's correct.

25 THE COURT: Then I have to look at it more carefully.

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1           MR. MILLER: The objection is there is no witness that  
2 testified regarding to it and all the information on there is,  
3 therefore, hearsay.

4           MR. PLATTA: Your Honor -- and Dr. Krishna actually  
5 testified about these records, as well as the records were  
6 presented to the jury at the time of my closing argument. They  
7 were projected on the screen.

8           THE COURT: Midtown Medical Practice, is that part of  
9 the empire that we heard about?

10          MR. PLATTA: No, your Honor.

11          THE COURT: What do you think is wrong with this? It  
12 was mentioned --

13          MR. MILLER: It was never testified to, your Honor.  
14 We had a right to cross-examine any witness that was going to  
15 testify in regards to that document. There is not one witness  
16 that testified to that document, and all the writings in them  
17 and findings are hearsay without the witness testifying.

18          MR. PLATTA: Your Honor, Dr. Krishna was actually  
19 testifying about these records and the records were shown to  
20 the jury at the time of my closing argument.

21          MR. MILLER: Shown to the jury, your Honor, is not a  
22 vehicle to bring in evidence. And if I'm mistaken, Dr. Krishna  
23 testified to it, I apologize. If counsel has a cite and  
24 location on a daily, I'll be happy to withdraw my objection.

25          THE COURT: This is signed by Villafuerte, anyway. We

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1 never heard from him, right?

2 MR. PLATTA: No, your Honor. He was not subpoenaed to  
3 the Court.

4 This is the part of the record that your Honor ruled  
5 in the very beginning of the case as admitted into evidence.

6 THE COURT: Was admissible into evidence.

7 MR. PLATTA: That's correct.

8 THE COURT: Do you have a number for it? I don't  
9 think so. I think what the defendants say is significant, too.  
10 As I told you, as I was exiting here, I'm glad to give the jury  
11 anything that we actually saw or talked about or felt, but I  
12 don't remember this testimony and I certainly never saw it  
13 before.

14 MR. PLATTA: Dr. Krishna actually testified as to the  
15 records because he mentioned during his testimony that my  
16 client went to this physical therapy place in the beginning.  
17 My client also testified about going to Dr. Villafuerte on many  
18 occasions, as well as the records were actually -- the records,  
19 15 through 24 of plaintiff's exhibits were admitted into  
20 evidence as per your prior ruling. No. 16 was medical records  
21 from Midtown Medical Practice, which is the same place as  
22 Dr. Villafuerte.

23 THE COURT: It was admitted without objection, as a  
24 matter of fact. It seems to me it makes it kind of difficult  
25 to keep out. Go ahead.

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1           MR. MILLER: Your Honor, records are records. This is  
2 a narrative report from a physician that did not take the  
3 stand, nor did any witness state they relied upon this report  
4 in their testimony.

5           THE COURT: I know. But it was given to you and you  
6 didn't object to its admissibility.

7           MR. MILLER: Per your Honor's rules, you told us that  
8 there has to be a vehicle through a witness to bring it  
9 through.

10          THE COURT: All it has to be is mentioned.

11          MR. MILLER: This report was not mentioned in anyone's  
12 testimony. It was only mentioned --

13          THE COURT: He is saying to me it was.

14          MR. MILLER: Plaintiff's closing was the only time it  
15 was mentioned.

16          THE COURT: I thought you said that's not the case.  
17 We have no transcript, so it's you guys we have to believe. If  
18 you each have a totally different view, then I guess I have to  
19 decide.

20                 What is your thought? Where was it mentioned?

21          MR. PLATTA: It was mentioned by Dr. Krishna during  
22 his testimony about the records of the Midtown Medical, as well  
23 the dates of treatment, and also by my client on numerous  
24 occasions during direct and cross-examination.

25          THE COURT: I'm letting it in over the objection of

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1 the defendant. I assume everything else is done.

2 MR. PLATTA: Your Honor, also, I would like to at this  
3 point extend an offer of a high-low settlement.

4 THE COURT: Counter offer.

5 MR. PLATTA: That's correct. Of 500 to a million to  
6 defendants in this case.

7 THE COURT: You're asking them if they would like to  
8 double their offer?

9 MR. PLATTA: No. I'm asking for them for a high-low  
10 negotiation, which is basically 500 to 1 million.

11 THE COURT: I don't get it.

12 THE DEPUTY CLERK: He wants anywhere from 500 to a  
13 million --

14 THE COURT: We are going to have an auction.

15 MR. PLATTA: No, your Honor. The idea is, I want to  
16 enter into high and low, which is basically if I lose the case,  
17 I get 500,000. If I win, maximum is one million.

18 THE COURT: Isn't this something that you're supposed  
19 to resolve with your adversary rather than me?

20 MR. PLATTA: That's correct. I just wanted to put  
21 that on the record.

22 THE COURT: Are you going to respond to that?

23 MR. COFFEY: We note it, your Honor, and thank you  
24 very much.

25 (Recess pending verdict)

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1 THE COURT: Gentlemen, I guess, did you read the note  
2 to them?

3 THE DEPUTY CLERK: They both read it.

4 THE COURT: Let me read it to Steve.

5 THE DEPUTY CLERK: F was the first one. This is G.

6 THE COURT: Plaintiff's direct testimony done by  
7 Mr. Platta and two physical therapy records. Unless you have a  
8 better idea or Steven has lost his voice, we probably will  
9 bring him out and let him listen.

10 MR. MILLER: Your Honor, there is an objection to the  
11 physical therapy records. The first set that's to your Honor's  
12 left, I agree, those are the ones with the physical therapy.  
13 Those are fine. I have no problems with those. It's the other  
14 set, your Honor, that's not from the physical therapy  
15 establishment, but they just asked for. That's  
16 Dr. Villafuerte's records that Mr. Platta thinks is a physical  
17 therapy record as well. That's my objection to the second  
18 sentence.

19 THE COURT: Why don't I look at them while we listen.  
20 There is the handwritten notes that you have an objection to,  
21 is that right?

22 MR. MILLER: Yes, your Honor. Only because they are  
23 not from the physical therapy facility.

24 THE COURT: He has it in rough. If you all think,  
25 rather than sit here for an hour and a half, we can give it to

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1       them. Take an hour. We will give it to them in an hour, then  
2       we don't have to do much but decide on this issue.

3               Let me tell them what's going to happen here. Where  
4       is the note? You got to keep the note. You know I can't.  
5       Let's get them in here.

6               MR. PLATTA: Your Honor, I would like to point out one  
7       more thing. The records that you have for physical therapy  
8       that were agreed upon by all the parties, there was actually an  
9       updated version that was submitted to the Court per subpoena  
10      and I pointed to defense counsel, I would prefer to use the  
11      version that was subpoenaed to the Court instead of the one  
12      that I presented because the one that I presented is basically  
13      the one that I had in my file and it's not updated.

14              THE COURT: Whichever one you introduce into evidence  
15      or brought to me to determine its admissibility is the one we  
16      are going to use. We are not going to start with new ones. If  
17      that's the one you use, that's fine. If this is the one you  
18      use, that's fine. Whichever it is, it's right on the exhibit  
19      list.

20              MR. PLATTA: Your Honor, these were the records  
21      brought by Dr. Krishna, actually, and that's why I would prefer  
22      to use notes.

23              THE COURT: I'm telling you what you are going to use.  
24      I'm not asking you.

25              MR. COFFEY: Your Honor, we only had the ones that

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1       were submitted in the joint pretrial.

2               THE COURT:   That's this one.   That's what we are going  
3       to let in.

4               MR. COFFEY:   Thank you.

5               THE COURT:   We will look at these other notes in the  
6       meantime.

7               MR. PLATTA:   Your Honor, the only thing is the  
8       pretrial order was done a few months ago and that's why --

9               THE COURT:   That's the breaks.   You should have  
10       brought them to my attention.   I have the feeling that you are  
11       trying this case backwards, Mr. Platta, that whatever occurs to  
12       you as we go along, you decide we want to take note of.   It  
13       doesn't work that way.   These progress notes, are they in  
14       evidence?

15              MR. PLATTA:   They are in evidence, that's correct.

16              THE COURT:   They are in evidence or they were marked  
17       and looked at by me and concluded as to their admissibility,  
18       and they are on the list that I gave you at the beginning of  
19       the trial.

20              MR. PLATTA:   That's correct, Judge.

21              THE COURT:   Can you help me with the number or letter?

22              MR. PLATTA:   Sure.   No. 21, medical records from  
23       Westchester Medical Care, PC.

24              THE COURT:   I think those are probably the ones that  
25       I've allowed to go in, that there was no objection to their



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1     admissibility. My view still is that we are going to use the  
2     ones that were submitted at the time you submitted your  
3     exhibits to me. We are not going to play catchup.

4             Are they ready?

5             THE DEPUTY CLERK: Yes. Jury entering.

6             (Jury present)

7             THE COURT: We have worked out a compromise with  
8     respect to your second note. Since there is no transcript of  
9     that, rather than your sitting here listening to Steve's dulcet  
10    poem for an hour and a half, he has it on rough computer and he  
11    is going to transpose it onto paper. But it will probably take  
12    about an hour, so meanwhile we will give you the physical  
13    therapy records. You may continue your deliberations. Just  
14    don't expect the transcript for a little while.

15            (Recess pending verdict)

16            THE COURT: The third note says: Two jurors have  
17    school obligations tonight and must leave by 4:45 p.m. If we  
18    do not reach a verdict by tonight, we will come back tomorrow  
19    to continue. May we be adjourned at 4:45. Yes. Thank you.  
20    That's all she wrote.

21            (Jury present)

22            THE COURT: It's sad to see you go so early, but I  
23    have this note and I certainly am not depriving mothers of  
24    going to a child's school. So I'm going to let you go now and  
25    ask you or direct you to return tomorrow morning. We will by

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1 that time have provided you with the transcript. And 9:30 is a  
2 good time and we might even provide you with donuts and coffee,  
3 if we can get Dennis to do that. But the fact of the matter is  
4 that you cannot start deliberating until all of you are here.  
5 You can't have three or four of you talking about the case  
6 while the other three or four of you are on your way in. So I  
7 am going to excuse you now until 9:30 tomorrow morning but ask  
8 that you all be here, as you've been, so I am sure you will be  
9 again, and let you go now. You're excused.

10 (Jury not present)

11 THE COURT: That saves me some trips up and down. We  
12 will see you in the morning.

13 (Adjourned to Thursday, September 11, 2008, at 9:30  
14 a.m.)

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